

The Internationalism of American Federalism: Missouri *and* Holland

The Earl F. Nelson Lecture

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1. All rights reserved, Judith Resnik, 2008. This Earl F. Nelson Lecture, given at the University of Missouri School of Law’s Symposium, *Return to Missouri v. Holland: Federalism and International Law*, developed from and overlaps with a series of articles including *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (with Joshua Civin and Joseph Frueh); *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008); *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT’L J. CONST. L. 33 (2008); *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY. L.J. 31 (2007); *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); and *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

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I. COUNSELING CAUTION WHEN LABELING THE “DOMESTIC,” THE
“FOREIGN,” THE “NATIONAL,” AND THE “LOCAL”

A. The Precautionary Principle and Toxic Toy Legislation
in California

In many countries in the world, concerns about the risks of injury from various sources are taken into account through regulatory regimes clustered under an approach called “the precautionary principle.” The idea is often credited to work related to consumer and environmental protection that was begun in Germany in the 1970s.² Today, one finds the commitment to using the “precautionary principle” codified in legislation in Europe. For example, the Swedish Unified Environmental Code of 1998 states that “precautionary measures [should] be undertaken as soon as there is reason to believe that an activity or measure can cause harm or inconvenience with respect to human health or to the environment.”³ Transnational provisions within the European Union have also relied on the precautionary principle when shaping regulation.⁴ In contrast, when assessing potential environmental or consumer harms in the United States, national policies have tended to focus on what is called “risk assessment” or “risk analysis,” aimed at providing a utilitarian weighing of costs and benefits.⁵

But not San Francisco. In 2003, that city’s Board of Supervisors concluded that, in light of its residents’ rights to a “healthy and safe environment,” it was time to create a new environment code that expressly referred to and incorporated the international “Precautionary Principle” (in that capitalized format) into local law.⁶ As the ordinance explains, the city’s Precautionary Principle imposes many duties and requires consideration of alternatives that impose “less hazardous options” so as to do as little damage as possible to human health and the environment.⁷ To implement this obligation, in 2005, San Francisco’s Board of Supervisors concluded that it would use “its power to make economic decisions involving its own funds as a participant in the marketplace . . . consistent with its human health and environmental

2. Julian Morris, *Defining the Precautionary Principle*, in JULIAN MORRIS, *RETHINKING RISK AND THE PRECAUTIONARY PRINCIPLE* 1, 1-21 (2000).

3. 3 § Environmental Code of 1998 (SFS 1998:811).

4. See, e.g., Treaty on European Union and Final Act, Belg.-Den.-Fr.-F.R.G.-Ir.-Italy-Lux.-Neth.-Port.-Spain.-U.K., art. 130r, Feb. 7, 1992, 1992 O.J. (C 224) 1, reprinted in 31 I.L.M. 247.

5. See FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004); see also Michael Pollan, *Precautionary Principle*, SCI. & ENVTL. HEALTH NETWORK (SEHN), Dec. 9, 2001, <http://www.sehn.org/pollan.html> (last visited Oct. 25, 2008).

6. Ordinance 171-03, enacted in 2003, is codified at S.F., CAL., ENVIRONMENT CODE ch. 1, § 100(E) (2008).

7. *Id.* at ch. 1, § 100(F).

policies.”⁸ To do so, and consistent with its “Precautionary Principle,” manufacturers were told to disclose the alternative substances that could have been used in the creation of various products.⁹

Consider more of the approach taken in Europe. Toward the end of the twentieth century, regulators began to focus on certain chemicals (called phthalates) that are used in cosmetics and toys and that have been linked to health hazards in studies on animals.¹⁰ These chemicals help make plastics flexible and add smells by binding fragrances to products. In 1999, the European Union issued a temporary ban on the use of six phthalates in children’s toys.¹¹ In 2003, the European Parliament and the Council of the European Union issued a directive prohibiting those chemicals in cosmetics manufactured after 2004.¹² In 2005, the ban on use in children’s toys became permanent.¹³

Return again to developments in the United States. In October of 2007, California Governor Arnold Schwarzenegger signed into law an amendment to that state’s Health and Safety Code. The new law was aimed at “toxic toys”¹⁴ and it provides that, as of 2009, “no person or entity shall manufacture, sell, or distribute in commerce any toy or child care article that contains” certain of those chemicals, and other chemicals cannot be used in “any toy or child care article intended for use by a child under three years of age if that product can be placed in the child’s mouth and contains” certain chemicals.¹⁵ Other states, including Maine, Maryland, Massachusetts, Michigan, New York, and Oregon, have considered similar bills.¹⁶ The legislative action in San Francisco and elsewhere provoked opposition, some of which was expressed through legal action. Business-based groups filed lawsuits challenging state and local action; they argued that federal law precluded local

8. Ordinance 115-05, passed in 2005, is codified at S.F., CAL., ENVIRONMENT CODE, ch. 2, § 200(A) (2008).

9. *Id.* at ch. 2, § 200(C).

10. See NAT’L CTR. FOR ENVTL. HEALTH, THIRD NATIONAL REPORT ON HUMAN EXPOSURE TO ENVIRONMENTAL CHEMICALS 251-82 (NCEH Pub. No. 05-0570) (2005 & Supps. 2006-2007).

11. See Council Directive 1992/59, 1992 O.J. (L 228) 24 (EC).

12. See European Parliament and Council Directive 2003/15, 2003 O.J. (L 66) 26 (EC).

13. See European Parliament and Council Directive 2005/84, 2005 O.J. (L 344) 40 (EC).

14. See Mark Schapiro, *Toxic Toys: Why Europe’s Children Are Safer than Ours*, THE NATION, Nov. 5, 2007, at 11-17, available at <http://www.thenation.com/doc/20071105/schapiro>.

15. See A.B. 1108, 2006-2007 Reg. Sess. (Cal. 2007).

16. See National Caucus of Environmental Legislators, *Phthalates: Enacted Laws, Introduced Bills (As of 10/17/07)*, http://www.ncel.net/news_uploads/179/Phthalate-Enacted-Introduced10-17-07.doc (last visited June 29, 2008). The list provided in the text includes states whose legislatures have rejected such proposals.

regulation.¹⁷ At the national level, in 2008, the Senate passed legislation that would have banned all but trace elements of phthalates in children's toys.¹⁸ Thereafter, a compromise bill on consumer product safety regulation became law; the 2008 act imposed some constraints on the use of phthalates, required study of others, and provided that its parameters did not preclude state regulation.¹⁹ In addition, some toy manufacturers have changed their standards on the use of these chemicals.²⁰

The 2007 California enactment was the outgrowth of several years of work. Proponents had initially advanced broader provisions that addressed cosmetics as well as toys and had credited a 2003 European cosmetic law as an influence. Further, the 2004 draft expressly defined a "prohibited substance" to include those substances prohibited by the "European Parliament and the Council of the European Union" in 2003.²¹ Subsequent amendments

17. See Complaint at 1, *Toy Indus. Ass'n v. San Francisco*, No. 3:06-cv-07111-SC (N.D. Cal. Nov. 17, 2006). The plaintiffs argued that the authority of the Consumer Product Safety Commission, which administers the Federal Hazardous Substances Labeling Act, preempted local action. At the time, the Commission had denied a petition to ban the chemicals in toys, and the plaintiffs had argued that the agency decision "expressly and formally determined that toys and other products intended for children . . . that contain . . . phthalates should not be banned or regulated." *Id.* at 4-5, 22-25.

18. See S. 2663 110 Cong. (2008) ("A Bill to Reform the Consumer Product Safety Commission to Provide Greater Protection for Children's Products").

19. The Consumer Product Safety Improvement Act of 2008 required third-party testing for certain children's products and an examination of safety standards for children's toys. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, §§ 101-107, 122 Stat. 3016. The Act also banned the sale of children's toys and child care articles containing a certain concentration of specific forms of phthalates, and more generally required a study of "the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles." *Id.* § 108 ("Prohibition on sale of certain products containing specified phthalates"). Further, Congress stated that nothing in that act "shall be construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the Consumer Product Safety Act." *Id.* § 108(d). Congress could thus be read as licensing state variations.

20. See Liz Szabo, *Toy Safety Steps back into National Spotlight*, USA TODAY, Mar. 17, 2008, at 4D.

21. The bill provided:

(c) "Prohibited substance" means either of the following:

(1) A substance identified in Annex I of Directive 67/648/EEC of the European Union as a category 1, 2, or 3 carcinogen, mutagen, or reproductive toxicant and prohibited from use in cosmetic products pursuant to Article 4b of Directive 2003/15/EC, adopted by the European Parliament and the Council of the European Union on February 27, 2003.

deleted that reference and much else. As enacted in 2007, the legislation in California (as well as a parallel provision in San Francisco²²) focused on toys, specified which chemicals are banned, and did not directly link the state's prohibitions to those in Europe.

I have just provided a first example of the role of the "foreign" in the "local;" in essence, California has adopted part of Europe's law as its own. This example is not only recent but also in an area, consumer product safety, that is not commonly found in the legal literature on federalism and transnational activities. Although the context is new, the activity is not; California's innovations are part of a pattern woven over centuries and thickening during the twentieth century, as can be seen by turning from toxic toys to human rights. After sketching such interactions around women's rights and climate change, I will turn to an analysis of their doctrinal and normative implications.

B. Transnational Commitments to Equality, Local Laws, and New Remedies, both National and International, for Violence Against Women

In 1981, the Convention on the Elimination of All Forms of Discrimination Against Women, or CEDAW as it has come to be known, entered into force.²³ A summary of its ambitions can be found in Article 3:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

As this excerpt illustrates, CEDAW requires signatory states to take action in political, social, economic, and cultural fields "to ensure the full development and advancement of women" to enable them to have "human rights and fundamental freedoms on a basis of equality with men."²⁴

(2) A substance prohibited from forming part of the composition of cosmetic products pursuant to Annex II of Directive 76/768/EEC, as adopted by the European Parliament and the Council of the European Union.

A.B. 2025, 2003-2004 Reg. Sess. (Cal. 2004).

22. S.F., Cal., Ordinance 86-07 (Apr. 27, 2007).

23. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33 (entered into force Sept. 3, 1981).

24. *Id.* at art. 3.

More than 180 countries have ratified the basic provisions of CEDAW, albeit sometimes with reservations as to particular aspects.²⁵ President Jimmy Carter signed CEDAW for the United States in 1980,²⁶ but subsequent administrations have either not persuaded the Senate to ratify the treaty or not tried to do so.²⁷ Opposition in the United States has been couched in the language of jurisdiction and sovereignty. As one of the Senators opposing ratification argued, signing CEDAW would be “surrendering American domestic matters to the norm setting of the international community.”²⁸

But as in the case of my opening example – the precautionary principle and toxic toys – to look only at the national level is to miss a lot of the action. By 2004, forty-four U.S. cities, eighteen counties, and sixteen states had passed or considered legislation relating to CEDAW,²⁹ with yet others contemplating action. Many localities have enacted expressive provisions, calling for the United States to ratify CEDAW. But a few take a different tack,

25. See Division for the Advancement of Women, United Nations, Convention on the Elimination of All Forms of Discrimination Against Women: States Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited June 28, 2006) (reporting 185 member-states).

26. See 126 CONG. REC. 29,358 (1980) (recording the signing on July 17, 1980; the Senate received the Convention on November 12, 1980); President’s Message to the Senate Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, 16 WEEKLY COMP. PRES. DOC. 2715 (Nov. 12, 1980).

27. Resolutions to do so remain pending. See H.R. Res. 101, 110th Cong. (Jan. 24, 2007) (expressing the “sense” of the House that “the full realization of the rights of women is vital to the development and well-being of people of all nations” and calling on the Senate to ratify CEDAW). That resolution was sponsored by ninety-six Democrats, lead by Representative Lynn Woolsey, of California. In February of 2007, the Bush Administration informed the Senate that it was not supportive of ratification. See LUISA BLANCHFIELD, CONGRESSIONAL RESEARCH SERVICE, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): CONGRESSIONAL ISSUES (2006).

28. *Treaty Doc. 95-53: Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the S. Comm. on Foreign Relations*, 107th Cong. 15 (2002) (statement of Sen. Michael Enzi).

29. CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN 73-74 (Leila Rassekh Milani, Sarah C. Albert & Karina Purushotma eds., 2004). According to Billie Heller and Ellen Dorsey, Iowa City was the first to adopt such a resolution, doing so on August 1, 1995. See Iowa City, Iowa, Resolution 95-222 (Aug. 12, 1995); see also Telephone Interview with Billie Heller, Chair, Comm. for Ratification of CEDAW (July 8, 2005); Telephone Interview with Ellen Dorsey, Bd. Member, Amnesty Int’l (Feb. 23, 2006). Many municipalities’ resolutions are not in databases, but to enable access, some of these materials are on file with the Yale Law Library. Those resolutions are detailed in Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1640 n.365 (2006) [hereinafter Resnik, *Law’s Migration*].

by turning this transnational law into local law. San Francisco is the prime example of such local incorporation. As that locality's Board of Supervisors declared, CEDAW, an "international human rights treaty" providing "a universal definition of discrimination against women":

brings attention to a whole range of issues concerning women's human rights. . . . The City shall work towards integrating gender equity and human rights principles into all of its operations, including policy, program and budgetary decision-making. The Commission shall train selected departments in human rights with a gender perspective.³⁰

The purpose was to "[i]ntegrate gender into every city department to achieve full equality for men and women" in areas ranging from public works to parks to probation.³¹ That technique has a name in transnational parlance, for it is what the United Nations, the Council of Europe, and the Commonwealth Secretariat call *gender mainstreaming*, aimed at ensuring that all social policy decisions are made with attention to their effects on women and men.³²

The conflict over ratification of CEDAW reflects debate ongoing within the United States about how to respond to persistent inequality predicated on gender. Not only is there disagreement about whether to join transnational efforts, but conflict surrounds the role that the national government should play. For example, in 1994 with then-Senator Joseph Biden of Delaware in the lead, Congress relied on its powers under the Interstate Commerce Clause and the Fourteenth Amendment to enact a new federal statute called the Violence Against Women Act (VAWA), which provided millions of dollars for programs, such as police training about gender-based violence and for shelters for victims, as well as new legal remedies to ease enforcement of interstate protective orders.

30. S.F., CAL., ADMIN. CODE §§ 12K.1(a), 12K.4(a) (2008).

31. See San Francisco Commission on the Status of Women, CEDAW Action Plan (2003), http://www.sfgov.org/site/cosw_page.asp?id=17146.

32. See The Secretary-General, *Review and Appraisal of the Implementation of the Beijing Platform for Action*, ¶¶ 11-15, delivered to the General Assembly, U.N. DOC. E/CN.6/2000/PC/2 (Jan. 19, 2000), available at <http://www.un.org/womenwatch/daw/csw/ecn6-2000-pc2.pdf> (discussing the United Nation's commitment to this approach); see also CHRISTINE M. CHINKIN, & FLORENCE BUTEGWA, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS (2001); GROUP OF SPECIALISTS ON MAINSTREAMING, COUNCIL OF EUR., GENDER MAINSTREAMING: CONCEPTUAL FRAMEWORK, METHODOLOGY AND PRESENTATION OF GOOD PRACTICES 5-6 (1998). This approach is not without its critics. See Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005) (arguing that the dominant methods of gender mainstreaming substitute bland approaches that deflect attention from inequality).

In VAWA, Congress included a provision it called the “Civil Rights Remedy” that authorized victims of violence that was animated by gender to bring damage actions against perpetrators in federal district courts. Thereafter, a female college student raped by two male students, one of whom was quoted in the record as saying that he particularly liked to inflict such harms on women, sued under VAWA’s civil rights remedy.³³ But in 2000, in *United States v. Morrison*,³⁴ the Supreme Court held this provision unconstitutional. Writing for the five person majority, Chief Justice Rehnquist characterized violence against women as “noneconomic, violent criminal conduct” and concluded that the provision was beyond the constitutional competence of Congress.³⁵

Calling the statute an effort to regulate criminal law, the majority reasoned that, were this civil rights remedy permitted, Congress could do more, regulating “family law and other areas of traditional state regulation.”³⁶ Ignoring that Congress does in fact regulate family life through many statutes – from bankruptcy and pension law (creating marital property rights), to tax, immigration, and federal benefit provisions³⁷ – the majority insisted on categorical and mutually exclusive boundaries. As Chief Justice Rehnquist put it: “The Constitution requires a distinction between what is truly national and what is truly local.”³⁸

In 2007, Senator Biden took a different tack – pursuing concerns about gender equality through invoking “national” authority over “international” issues. With other senators, Biden proposed the International Violence Against Women Act of 2007 (IVAWA) with provisions that sound familiar because they echo San Francisco’s incorporation of CEDAW precepts. As its statement of United States policy, the international VAWA lists efforts to “promote women’s political, economic, educational, social, cultural, civil,

33. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 827 (4th Cir. 1999) (en banc).

34. 529 U.S. 598 (2000).

35. *Id.* at 617; see also *id.* at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”).

36. *Id.* at 615-16.

37. The growth of some of that law is detailed in Judith Resnik, “*Naturally Without Gender: Women, Jurisdiction, and the Federal Courts*,” 66 N.Y.U. L. REV. 1682 (1991); see also THE EFFECTS OF GENDER IN THE FEDERAL COURTS; THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, reprinted in 67 S. CAL. L. REV. 745, 857-99 (1994).

38. *Morrison*, 529 U.S. at 617-18. A parallel effort to delineate by using the terms “internal” and “external” comes from the *Medellin* litigation about consular notification. See *Ex parte Medellin*, 223 S.W.3d 315, 333-34 (Tex. Crim. App. 2006), *aff’d*, 128 S. Ct. 1346 (2008). More poignant, as pointed out by the state of Texas’s decision, was how to characterize the petitioner himself; born in Mexico, he had lived since age three in the United States. See *id.* at 358 (Hervey, J., concurring).

and human rights and opportunities throughout the world.”³⁹ The bill would do so by creating a special office, called “Women’s Global Initiatives,”⁴⁰ headed by a presidential appointee, a “Coordinator,” to work with the United Nations and other international organizations to “systematically integrate and coordinate efforts to prevent and respond to violence against women and girls into United States foreign policy and foreign assistance programs, and to expand implementation of effective practices and programs.”⁴¹ In other words, the effort is to “mainstream” a range of efforts on gender-based violence into American foreign aid programs.

C. Warming Climates, Migratory Birds, Assertions of Sovereignty, and Layered Governance

A third example is climate control, which also brings me to a discussion of *Missouri v. Holland*, to which this symposium is dedicated. In 1997, meetings in Kyoto, Japan, produced an accord to address global warming through a framework in which nations agreed to certain timetables to reduce greenhouse gas emissions.⁴² In 1998, on behalf of the United States, President William J. Clinton signed what is called the Kyoto Protocol.⁴³

That decision sparked opposition in some quarters. In 1998, a group comprised of former governmental officials came together to proffer their assessment of the Protocol; they called themselves the Committee to Preserve American Security and Sovereignty, thereby providing an acronym – COMPASS – that itself reiterated an anchoring premise of the report: the importance of place. The group issued a statement, *Treaties, National Sovereignty, and Executive Power: A Report on the Kyoto Protocol*,⁴⁴ accusing the Protocol of “imping[ing] on our national sovereignty” by undermining the legitimate exercise of U.S. sovereign decision making.⁴⁵ This stance, akin to that proffered by opponents of CEDAW, reflects a form of *sovereignism*, a

39. International Violence Against Women Act of 2007, S. 2279, 110th Cong. § 3 (2007).

40. *Id.* § 300B.

41. *See id.* §§ 300B, 3.

42. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Conference of the Parties, 3d Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1997), reprinted in 37 I.L.M. 22 (1998), available at http://unfccc.int/essential_background/kyoto_protocol/items/1678.php.

43. Kyoto Protocol: Status of Ratification (Oct. 16, 2008), http://unfccc.int/files/kyoto_protocol/status_of_ratification/application/pdf/kp_ratification.pdf (last visited Oct. 25, 2008).

44. COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, TREATIES, NATIONAL SOVEREIGNTY, AND EXECUTIVE POWER: A REPORT ON THE KYOTO PROTOCOL (1998), <http://jamesvdelong.com/articles/environmental/kyoto.html>.

45. *Id.*

position insistent on a nation's right to define and delineate its own lawmaking.⁴⁶

Nations are not the only entities to assert such interests. In a refrain that is familiar in discussions of federalism in this country, states sometimes also assert their sovereignty when objecting to national laws. The litigation that produced *Missouri v. Holland*⁴⁷ provides one such illustration. After the United States joined with Great Britain in the early part of the twentieth century in a treaty to protect migratory birds, Congress enacted a new statute regulating the hunting of such birds. Protesting the criminal enforcement of that law, the state of Missouri asked a court to enjoin U.S. Game Warden Ray Holland from implementing the statute, and argued, "[T]he statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and . . . the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes."⁴⁸

Before the Court, Missouri claimed that states had an "absolute" right to control the taking, killing, and use of wild game within their borders, and that such right was recognized by "ancient law, feudal law, and the common law in England" as an "attribute of government and a necessary incident of sovereignty."⁴⁹ Further (as Chief Justice Rehnquist would argue eighty years later, when holding the VAWA Civil Rights Remedy unconstitutional in *Morrison*), Missouri's brief warned about a slippery slope – if the federal government could regulate birds, then regulation of child labor, methods of election, and food were not far behind.⁵⁰

The idea that states did have special authority over individuals' conduct vis-à-vis such resources was reflected, in some respects, in the Supreme Court's decision in *Missouri v. Holland*. As Justice Holmes put it: "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."⁵¹ But, as is also familiar, the decision concluded that the power to make treaties could be used to support lawmaking beyond what might otherwise be available to Congress.

Yet the opinion ought not to be read (as it sometimes is) to support only the categorical and exclusive power of the national government. While

46. Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT'L J. CONST. L. 33 (2008) [hereinafter Resnik, *Law as Affiliation*]; see also Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec., 2000, at 9, available at <http://www.foreignaffairs.org/20001101facomment932/peter-j-spiro/the-new-sovereignists-american-exceptionalism-and-its-false-prophets.html>.

47. 252 U.S. 416 (1920).

48. *Id.* at 431.

49. Brief of Appellant at 27, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609) (citing *Geer v. Connecticut*, 161 U.S. 519, 523-30 (1896)).

50. *Id.* at 41.

51. *Holland*, 252 U.S. at 434.

asserting federal authority such that states could not block efforts to protect migratory birds, *Missouri v. Holland* also recognized states' concurrent authority in the very arena at issue through the Court's citation of *Carey v. South Dakota*, decided in 1919.⁵² There, a man convicted under a state statute prohibiting shipping wild ducks had argued that the federal power exercised in the Migratory Bird Act preempted the state's criminal statute. Speaking on behalf of a unanimous Court, Justice Brandeis upheld the conviction by concluding that the federal government had not occupied the field⁵³ and that the state law was not in conflict with the federal provision.⁵⁴

The decision in *Missouri v. Holland* thus acknowledged forms of *concurrency* while it also rejected the divestiture of national power through the "invisible radiation from the general terms of the Tenth Amendment."⁵⁵ More than that, Holmes (who had fought in the Civil War) reminded his readers that the founders of the country had created an organism that it had "taken a century and . . . cost . . . much sweat and blood to prove [was] a nation."⁵⁶ His decision insisted on the need for federal power, and by relying on the Treaty power, the decision's outcome opened up new avenues to support regulation⁵⁷ – pathways that, soon thereafter, came to be less important because revised interpretations of congressional authority under the Commerce Clause served to support a variety of federal legislation.

Even at the time that *Missouri v. Holland* was decided, it was conceivable to have used the Commerce Clause to sustain the Migratory Bird Act. That point was made by the brief filed by the United States government in the Supreme Court, which quoted the lower court opinion to that effect. "Even in matters of a purely local nature, Congress, if the Constitution grants it plenary powers over the subject, may exercise what is akin to the police power, a

52. 250 U.S. 118 (1919).

53. *Id.* at 122 ("The intent to supersede the exercise by a state of its police power is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state.")

54. *Id.* The Court compared the prohibition of the federal act ("limited to the provision that the birds 'shall not be destroyed or taken contrary to regulations'") that did not address shipping, with the "prohibition of the state law . . . limited to forbidding persons to 'ship . . . by common or private carrier.'" *Id.* at 121. The Court concluded that state law was not inconsistent with federal law. *Id.* at 122.

55. *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

56. *Id.* at 433.

57. For example, when advocating use of the Compact Clause, Felix Frankfurter and James Landis noted both the need for the "protection of fish on boundary waters" and the question of whether Congress had the power to do so. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 YALE L.J. 685, 699 & n.61 (1925). Frankfurter and Landis argued that "[r]egional control" was the "practical answer" when a "field for regulation . . . seems" constitutionally "beyond the scope of the Federal government." *Id.* at 699. They also noted that *Missouri v. Holland* "opens up possible vistas of Federal regulation through the exercise of the treaty-power." *Id.* at n.61.

power ordinarily reserved to the States. Thus, under the commerce clause of the Constitution, many acts of Congress have been sustained.”⁵⁸ Moreover, “[a]gainst the majority of the Court, [Holmes had] found no hindrance in the Constitution to legislation seeking industrial peace on railroads, or promoting civilized social standards through interstate commerce.”⁵⁹

But Holmes did not take that route, perhaps because of the controversy that had surrounded the enactment in 1913 of an earlier Migratory Bird Act that had also provided national powers to protect birds through criminalization. A split in the lower courts about the 1913 Act’s constitutionality had interrupted federal government enforcement.⁶⁰ As one commentator described it, despite more than 1,300 violations of the 1913 Act, prosecutions under it had “halted because of doubts concerning its constitutionality.”⁶¹ The 1916 treaty with Great Britain created the opportunity for new legislation, and Congress enacted another bill in 1918 – thus giving rise to the *Missouri v. Holland* decision.⁶² Yet when *Missouri v. Holland* is read against the backdrop of the Court’s decisions of 1903 and 1913 that relied on the Commerce Clause to uphold federal statutes regulating the purchase and sale of lottery tickets⁶³ and the interstate transport of women in commerce for “immoral purposes,”⁶⁴ (as well as the Court’s subsequent approval of national authority over intrastate wheat in *Wickard v. Filburn*⁶⁵), readers can wonder why the migration of birds and the sale of dead ducks could not similarly have been seen as a mixture of commerce, morality, and trans-state effects falling within the federal government’s reach.

In addition, reading back through the lens of contemporary federal environmental law, *Missouri v. Holland* nests (pun intended) within the pervasive commitment to the protection of natural resources understood now as “naturally” falling under the rubric of

58. See Brief of Appellee at 20, *Holland*, 252 U.S. 416 (No. 609) (quoting *United States v. Thompson*, 258 F. 257, 264 (E.D. Ark. 1919)).

59. JULIUS J. MARKE, *THE HOLMES READER* 127, 152 (2d ed. 1964) (citing Holmes’ dissents in *Adair v. United States*, 208 U.S. 161, 191-92 (1908); *Hammer v. Dagenhart*, 247 U.S. 251, 277-81 (1918)).

60. See Charles A. Lofgren, *Missouri v. Holland in Historical Perspective*, 1975 SUP. CT. REV. 77. He there detailed the lower court holdings on whether the 1913 Migratory Bird Act was within federal power, the arguments based on federal trusteeship over lands, and Article IV authority. *Id.* at 77-80.

61. *Id.* at 83 & n.32.

62. *Id.* at 80-82; see also Forrest Revere Black, *Missouri v. Holland – A Judicial Mile-Post on the Road to Absolutism*, 25 ILL. L. REV. 911 (1931).

63. See *Champion v. Ames*, 188 U.S. 321 (1903).

64. See *Hoke v. United States*, 227 U.S. 308, 317 (1913); see also *Caminetti v. United States*, 242 U.S. 470, 483 (1917).

65. 317 U.S. 111 (1942).

interstate and transnational concerns. As Holmes put it in 1920:

Wild birds are not in the possession of anyone The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. . . .

Here a national interest of very nearly the first magnitude is involved. . . . The subject matter is only transitorily within the State and has no permanent habitat therein. . . . We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.⁶⁶

In sum, *Missouri v. Holland* is famous (and contested) today for the proposition that the Senate can use its treaty power to do what is otherwise beyond its power,⁶⁷ but within a few decades after the opinion was issued, Congress no longer needed treaty power as a predicate to regulate birds; Congress's powers under the Commerce Clause had been reconceived to be capacious. Furthermore, contemporary treaty experts do not cite a litany of treaties that have relied on *Missouri v. Holland* because the treaties entail law-making beyond the scope of other congressional powers. Politicians have plainly been self-conscious about when to ally with international proposals, and Congress has not regularly used the opinion as a means of self-aggrandizement.⁶⁸ Thus, when *Missouri v. Holland* is read with its citation to *South Dakota v. Carey* recognizing concurrent state authority and contextualized through subsequent constitutional developments, it should serve less as an emblem of a dramatic and implicitly preclusive federal authority over

66. *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920).

67. See, e.g., Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

68. During the 1950s, commentators did mention that treaties involving "rights of aliens to own land, to inherit property and to transfer property by will . . . to rights of aliens to engage in trade . . . having no interstate character," or for extradition of "purely domestic" crimes and related to "inheritance taxes" could need support from the Treaty Power. See John B. Whitton & J. Edward Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AM. J. INT'L L. 23, 38 (1954). Justice Breyer also invoked *Missouri v. Holland* when writing that the treaty power could be a source of congressional authority vis-à-vis Indian tribes. See *United States v. Lara*, 541 U.S. 193, 201 (2004). Further, as Peter Spiro discusses in this symposium, although the decision has not been called upon to do much "work" to date, it could be a source of authority if the United States expands its global activities. Peter J. Spiro, *Resurrecting Missouri v. Holland*, 73 MO. L. REV. 1029 (2008).

transnational resource questions and used more as a pillar in our understanding of the potential for overlapping federal and state action, permitting complementary state activities even when transnational regimes are implicated.

Consider how *Missouri v. Holland* also provides insights into the plasticity of the categories of the “truly local” and the “truly national.”⁶⁹ The attitude that birds and water and other natural resources were regulated at the state, rather than at the national, level persisted through many decades of the twentieth century. Illustrative is the 1971 decision of *Ohio v. Wyandotte Chemicals Corporation*,⁷⁰ in which Ohio sought to invoke the original jurisdiction of the United States Supreme Court in an effort to protect its citizens from the harms of mercury, allegedly produced by the defendant chemical plants that were polluting Lake Erie’s “waters, vegetation, fish, and wild-life.”⁷¹

At that time, the problem was seen as grounded in state tort law; Ohio sought the abatement of this “nuisance.”⁷² The Supreme Court declined to take jurisdiction. As the majority opinion by Justice John Harlan put it, interstate pollution issues were complex, and courts were not well suited to deal with “environmental blights.”⁷³ Furthermore, as the Court explained, the underlying legal claims did not appear to be governed by federal law.⁷⁴ As a consequence, and over the dissent of Justice Douglas, the Court’s famous environmentalist who argued that the Department of Justice had supported the Court’s exercise of jurisdiction,⁷⁵ the Supreme Court sent Ohio away to make its complaint elsewhere.

69. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000); see *supra* note 38 and accompanying text.

70. 401 U.S. 493 (1971).

71. *Id.* at 494.

72. Complaint at 8, *Wyandotte*, 401 U.S. 493 (No. 41 Original), WL 136230 (“The conduct of Defendants in introducing poisonous mercury or compounds thereof into Lake Erie is concurrent and such conduct constitutes a public nuisance which must be abated in order to protect Lake Erie and the health and safety of the citizens and inhabitants of Ohio.”).

73. *Wyandotte*, 401 U.S. at 505.

74. See *id.* at 497-98. As commentary in the early 1970s pointed out, a section of the Rivers and Harbors Act of 1899 known as the “Refuse Act” prohibited the discharge into U.S. navigable waters of materials “other than that flowing from streets and sewers and passing therefrom in a liquid state.” See Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407 (2000)); Robert J. Rauch, Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 HARV. J. ON LEGIS. 565 (1973) [hereinafter Rauch, *Federal Water Pollution Control Act Amendments of 1972*]. In 1966, the Supreme Court upheld its application to the discharge of gasoline into a river. See *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

75. *Wyandotte*, 401 U.S. at 512 (Douglas, J., dissenting). In the 1966 *Standard Oil* case, Justice Douglas wrote the majority opinion upholding a federal prosecution

Yet, soon thereafter, those assumptions flipped. Within a period of some thirty years, what had been understood to be quintessentially a “state” and “local” issue became taken-for-granted as obviously a matter for federal governance. That shift came from a mix of legal and political changes, as federal dollars supported environmental protection efforts and national regulation came to impose standards and procedural regulation. In the 1950s and 1960s, federal initiatives provided funds for the research and monitoring of air pollution.⁷⁶ In 1970, through President Richard Nixon’s executive order, the Environmental Protection Agency came into being.⁷⁷ In the same year, Congress created the National Environmental Policy Act (NEPA).⁷⁸ Thereafter, Congress undertook major revisions of the Clean Air Act.⁷⁹ In 1973, Congress enacted the Endangered Species Act.⁸⁰

As for water, litigation in the 1960s involving the 1899 Rivers and Harbors Act brought renewed attention to federal water policy.⁸¹ In 1972, and over a presidential veto, Congress amended the Federal Water Pollution Control Act⁸² and, through additional revisions in 1977, Congress used the

by concluding that the term “refuse” in the 1899 Rivers and Harbors Act included “commercially valuable oil” and not only waste or rubbish. *Standard Oil*, 384 U.S. at 226-27. Justices Harlan, Black, and Stewart dissented, arguing that the criminal statute ought to be strictly construed and that the term “refuse” – coupled with their view of traditional state governance of pollution – prohibited the statute’s application to commercially useful (aviation gasoline) discharges. *Id.* at 230, 236-237 (Harlan, J., dissenting). For additional glimpses into Justice Douglas’ views on the need for environment protection see, *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* (1974).

76. In 1955, Congress provided federal funds for research through the Air Pollution Control Act. Pub. L. No. 84-159, 69 Stat. 322 (1955). In the 1963 version of the Clean Air Act, Congress authorized the United States Public Health Service to research and monitor air pollution. Pub. L. No. 88-206, 77 Stat. 392 (1963). In 1967, the Air Quality Act began to provide for federal enforcement of interstate air pollution. Pub. L. No. 90-148, 81 Stat. 485 (1967).

77. Reorganization Plan No. 3 of 1970, 5 U.S.C. app. § 1 (2006).

78. Pub. L. No. 91-190, 83 Stat. 852 (1970).

79. See Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

80. Pub. L. No. 93-205, 87 Stat. 884 (1973).

81. See *United States v. Standard Oil Co.*, 384 U.S. 224 (1966); Rauch, *Federal Water Pollution Control Act Amendments of 1972*, *supra* note 74.

82. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)). Those provisions are analyzed in Rauch, *Federal Water Pollution Control Act Amendments of 1972*, *supra* note 74, at 571-95. The House and Senate bills varied a good deal. See The Federal Water Pollution Control Act Amendments of 1972, H.R. REP. NO. 92-1465 (1972) (Conf. Rep.), as reprinted in 1972 U.S.C.C.A.N. 3776. Rauch argued that the compromise was to vest a great deal of discretion in the administrator of the

renamed Clean Water Act to set wastewater standards for industry and quality standards for contaminants of surface waters.⁸³ Moving forward to the winter of 2008, when complaints arose about levels of mercury in fish used for sushi in Japanese restaurants, complaints were heard that the *federal* government had not done enough to monitor this pollutant to protect us. Thus, the slippery slope that Missouri warned about in the 1920s has proved true – for the government’s regulation of birds has indeed been followed by its regulation of labor and of food, fish included.

Moreover, by the twenty-first century, the commitment to federal power over the environment and its species proved deep enough to constrain the legal import of the 2000 decision in *Morrison*. Recall that the Court had held unconstitutional the congressionally-created “Civil Rights Remedy” in the multi-faceted Violence Against Women Act; the five-person majority held that the legislature did not have authority to enact that remedy under either the Commerce Clause or through its Fourteenth Amendment powers. Yet the congressional hearings on VAWA had included details of the enormous economic costs of violence against women, as well as how threats of violence affected the job opportunities of women in the wage workforce. Given the Court’s holding that such information was insufficient to support VAWA’s Civil Rights Remedy, one might also have assumed that Congress also lacked power under the Commerce Clause to enact legislation protecting endangered species.

That claim was made soon after *Morrison*, when a man who had shot a wolf on private lands fought his conviction under a federal regulation making it illegal to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” any endangered species.⁸⁴ He argued that Congress had no power to regulate these animals as long as they were on private property within a state, and that the relatively few red wolves in the state (estimated to number under eighty) had virtually no economic impact. But a Fourth Circuit decision, *Gibbs v. Babbitt*,⁸⁵ explained that local wolves could be regulated under interstate commerce. The majority distinguished *Morrison* by arguing that national authority flowed because the “national wildlife-related recreational industry . . . involves tourism and interstate travel.”⁸⁶ Over the last decade, environmental law has become so federalized that current conflicts focus on whether states have any role to play, for example, in making policies related

EPA. Rauch, *Federal Water Pollution Control Act Amendments of 1972*, *supra* note 74, at 571-72.

83. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)).

84. *See* 16 U.S.C. §§ 1538(a)(1)(B), 1532(19) (2000); 50 C.F.R. § 17.84(c) (2007).

85. 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.* *Gibbs v. Norton*, 531 U.S. 1145 (2001). The Fish and Wildlife Service had, beginning in 1987, reintroduced red wolves into a refuge area of North Carolina.

86. *Id.* at 493.

to emissions; car manufacturers have recently attempted to block state regulation by arguing that federal law preempts state regulation.⁸⁷

In short, the mercury in Lake Erie and the birds in Missouri can be (and are) now governed under federal law. But the sovereigntist position of the 1920s in *Missouri v. Holland* persists, such that decades later the critics of the Kyoto Protocol make parallel assertions, predicated on comparable classifications – that by joining the Protocol, decisions that were properly “domestic” would become “foreign” and thereby regulated outside the proper channels of U.S. majoritarian democratic processes.

How can one tell what problems fall within either arena? Take, as examples, the questions of whether Missouri can regulate the hunting of ducks, or whether California can ban chemicals from certain toys sold in its state, or whether transnational agreements can regulate energy use. What would put a problem into one category or another? Anyone familiar with the jurisprudence of the Commerce Clause knows the unsuccessful efforts to bound the local from the national, and similarly all of the examples I have proffered have both “domestic” and “foreign” effects.

But COMPASS – like Chief Justice Rehnquist in the VAWA litigation – instead took a categorical approach, insistent on the assignment of a topic exclusively to a particular level of government. Feminist theorists call this kind of analysis “essentialism,” reliant on presumptively intuitive or natural distinctions as the source of differences rather than understanding that social constructions shape our understanding of what makes an attribute distinctive (and in the context of feminist analyses, presumed suitably female and male). My point, of course, is that jurisdictional classifications about consumer safety, human rights, equality, and energy policy – as “domestic” or “foreign” – are likewise human constructions rather than artifacts of nature.

II. THE DOMESTICATION OF THE "FOREIGN" THROUGH DEMOCRATIC FEDERALISM

What is at stake in the effort to assert sovereignty and to categorize something as “domestic,” “foreign,” “national,” or “local”? The objectors to the United States joining the Kyoto Protocol made plain that the issues were about *power* and *process*. The report argued that the Kyoto Protocol would “convert decisions usually classified as ‘domestic’ for purposes of U.S. law and politics into ‘foreign’ ones, thereby giving undue power to the President at the expense of Congress, local governments, and private entities.”⁸⁸ Further, COMPASS charged that Kyoto gave power to federal and state courts, which could act through customary international law, to create a new

87. See *Central Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1154 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 343-46 (D. Vt. 2007).

88. COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, *supra* note 44.

“super-national source of binding legal rules.”⁸⁹ COMPASS also complained that the Kyoto Protocol showed the unacceptable influence of NGOs – non-governmental organizations – that were “not politically accountable.”⁹⁰ These concerns often come under the rubric of a “democratic deficit.”

Given COMPASS’s insistence on the “domestic” nature of the issues and the flip-flopping of categories that I detailed above (in discussing *Missouri v. Holland*, *Ohio v. Wyandotte Chemical Corporation*, and federal regulation of the environment and endangered species that have rendered concerns once conceptualized as state matters into issues now seen as obviously subject to federal regulation), what happened on the “domestic” front is particularly illuminating. After a presidential election in which the Republicans gained control of the White House, President George W. Bush withdrew American support.⁹¹ In February of 2005, the Kyoto Protocol went into effect with a group of 141 other countries that had ratified it.⁹²

Many local officials in the United States did not share the President’s views. Several cities, including Seattle and Salt Lake City, enacted ordinances aimed at conforming to the Protocol’s targets for controlling local utility emissions. In March 2005, a group of nine mayors agreed to their own climate protection program,⁹³ which was approved by the United States Conference of Mayors in June 2005. They sought to “meet or beat the Kyoto Protocol targets in their own communities,” to encourage federal and state governments to meet Kyoto targets, and to have Congress pass bipartisan legislation to create an emissions trading system.⁹⁴ By the fall of 2008, 884 mayors, representing towns and cities with combined populations numbering almost 81 million people, endorsed that program.⁹⁵

89. *Id.*

90. *Id.*

91. See *U.S. Rejection of Kyoto Protocol Process*, 95 AM. J. INT’L L. 647, 647-49 (2001).

92. See U.S. Conference of Mayors, Endorsing the U.S. Mayors Climate Protection Agreement (2005), available at http://usmayors.org/resolutions/73rd_conference/en_01.asp.

93. Office of the Mayor of Seattle, Wash., U.S. Mayors Climate Protection Agreement, <http://www.seattle.gov/mayor/climate> (last visited Oct. 25, 2008).

94. *Id.*

95. See Mayors Climate Prot. Ctr., List of Participating Mayors, <http://www.usmayors.org/climateprotection/list.asp> (last visited Oct. 25, 2008); see also Lina Garcia, *800 Mayors Join Mayors Climate Protection Agreement*, U.S. MAYOR NEWSPAPER, Mar. 10, 2008, available at http://usmayors.org/uscm/us_mayor_newspaper/documents/03_10_08/pg10_800_mayors.asp. The role of states and cities in environmental regulation is explored by several commentators. See, e.g., Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681 (2008); Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT’L L. 409 (2008); Michele M. Betsill & Barry G. Rabe, *Climate Change and*

Those who wrote the COMPASS report had argued that transnational activity undercut local democratic practices in the United States. But, to the contrary, the Kyoto Protocol – and national reluctance – proved to be a spur, prompting a sequence of democratic iterations in which policies have been openly examined across the United States. These transparent debates have resulted in politically elected officials championing features of Kyoto. Moreover, they took what had been conceived of in 1972 as a nation-to-nation problem and turned it into an issue of translocal governance.

Having set forth three examples of the interaction between the domestic and the foreign, the national and the local, a summary of the analytic and normative implications is in order. First, efforts to essentialize a certain kind of problem as intrinsically to be decided by a particular level of government are doomed to fail, as many of today's challenges have local, national, and global dimensions. Whether the problem is rape or global warming, the toys in a child's hands (and mouths), or the birds that fly over us and the mercury in the water nearby, one cannot presume that the problems are "truly national" or "truly local," as many issues are both local and national as well as domestic and foreign.

This proposition can be substantiated by much more than the three examples I have given, as the pattern I have sketched can be found repeatedly during the twentieth century. Examples of translocal-transnational efforts that have both internal and external effects include initiatives seeking to alter the conduct of the Vietnam War, the Gulf War, and the conflicts in Northern Ireland and the Middle East, to promote nuclear disarmament, to protect against land mines, to end apartheid in South Africa, to help provide restitution for holocaust victims,⁹⁶ to try to stop the war in Iraq,⁹⁷ genocide in Sudan,⁹⁸ sweatshop labor,⁹⁹ and to enhance gun control.¹⁰⁰ Given the range, one

Multilevel Governance: The Evolving State and Local Rules (2008) (unpublished chapter, on file with the author).

96. See BRIAN HOCKING, LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTILAYERED DIPLOMACY (1993); JANICE LOVE, THE UNITED STATES ANTI-APARTHEID MOVEMENT: LOCAL ACTIVISM IN GLOBAL POLITICS (1985); Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1032-40 (2001); Shanna Singh, Note, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537, 545, 548-49 (2005).

97. Jennifer Steinhauer, *Democrats in State Capitols Push Antiwar Resolutions*, N.Y. TIMES, Feb. 16, 2007, at A14.

98. See, e.g., Save Darfur Homepage, <http://www.savedarfur.org> (last visited June 6, 2008); see also *infra* notes 199-204 and accompanying text (discussing federal legislation regulating the divestment of assets from companies doing business in Sudan).

99. See Adrian Barnes, Note, *Do They Have to Buy from Burma?: A Preemption Analysis of Local Antisweatshop Procurement Laws*, 107 COLUM. L. REV. 426 (2007).

100. See Sewell Chan, *52 Mayors Unite in Washington to Curb Illegal Firearms*, N.Y. TIMES, Jan. 24, 2007, at B6.

commentator forecast that, “[u]nless America becomes a police state, municipal foreign policies are here to stay.”¹⁰¹

Second, because these efforts are deeply democratic, in the sense that they spring either from referenda enacted by majorities or from agendas of popularly-elected presidents, governors, mayors, and city council members, taking positions that resonate with their constituencies, such transnational policy initiatives are not necessarily counter-majoritarian. To the extent sovereigntism seeks to be grounded in majoritarianism, it can demonstrate no such theoretical or practical underpinnings. Sometimes, sovereigntist positions win popular initiatives to erect boundaries, and other such attempts – as illustrated by the Mayors’ climate control efforts linked to those abroad – lose.

Third, opponents of the Kyoto Protocol, of CEDAW, and of the Precautionary Principle, were and are *correct* to worry about transnational influences on domestic policies and laws. The Kyoto Protocol, like CEDAW and the Precautionary Principle, have all had an impact in the United States; these approaches have appealed to local leaders in their search to generate new policies in response to pressing problems. Deep inside the local, one can often see the global. Sometimes – as in the first version of the toxic cosmetics legislation, in San Francisco’s CEDAW provisions, and in the Mayors’ Climate Control program – outside influences are expressly named. Other times – such as in the 2007 bill on toxic toys that passed the California legislation – the texts are silent but the dialogues can be found in legislative histories, cross country comparisons, and background information.¹⁰² Laws – like people and birds – migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere.

And, again, these propositions are not of recent vintage. While I have focused on events over the last few decades, transnational local actions are not new. Examples of “law’s migration”¹⁰³ in the eighteenth and nineteenth century include the incorporation of a due process clause in the U.S. Constitution. Its terms were built from English, French, and from state laws making the point that liberty and property ought not to be deprived arbitrarily. Similarly, both the abolition and suffrage movements were worldwide and connections across localities made important contributions to changing practices in the United States.¹⁰⁴ Moreover, developments in U.S. laws to provide for more equality were not at the forefront of either abolition or suffrage; some of the states were in the lead. As an empirical matter, “foreign law” has had a major impact on American constitutional law through various channels, both

101. Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, FOREIGN POL’Y, Winter 1986-1987, at 154, 171; *see also* Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071 (2008).

102. Those silent dialogues can be found in adjudication as well. *See* Resnik, *Law’s Migration*, *supra* note 29, at 1591-98.

103. *See generally id.*

104. *Id.* at 1584-88.

judicial and majoritarian.¹⁰⁵ Over time, the origins of rules blur such that certain legal precepts are now seen to be foundational to the United States. But one should label them “made in the USA” knowing that – like many other “American” products – some of their parts are designed abroad.

Opposition to foreign influences is likewise longstanding and remains relevant today. *Missouri v. Holland* is of contemporary interest (despite some predictions it would be “interred in the casebooks and history texts”¹⁰⁶) because of those concerns – that transnational law making will have undue import in the United States. A mid-twentieth century example of distress is of particular relevance to any discussion of *Missouri v. Holland*. Soon after the United Nations was founded, Senator John Bricker of Ohio sought to have the U.S. Constitution amended to state that “[n]o treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution.”¹⁰⁷ One of the rallying cries for his supporters was to overturn *Missouri v. Holland* – seen to embody the harms that treaty-making posed for state sovereignty.¹⁰⁸ In the early 1950s, Bricker’s focus was not state control over game birds but rather over race; what made Bricker’s supporters particularly nervous was the proposition that the commitments to equality in the U.N. documents would interfere with the racial segregation of the United States. Bricker’s proposal was immensely popular; one version of the proposal lost in the Senate by a single vote.¹⁰⁹

Echoes (or as Louis Henkin has put it, the “ghost”¹¹⁰) of Senator Bricker can be heard today, as members of Congress also aim to limit foreign influences. Their chosen technique is to ban judicial citation of foreign law through a proposal called “The Constitution Restoration Act.”¹¹¹ That legislation would have provided that federal courts were not, when “interpreting and applying the Constitution of the United States,” to rely on “any constitution, law, administrative rule, Executive order, directive, policy, judicial

105. I am not the first to turn to the import/export image. See Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

106. Lofgren, *supra* note 60, at 122.

107. S.J. Res. 130, 82d Cong. (1952), reprinted in Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower’s Political Leadership* app. C at 222 (1988).

108. See *Hearings Before a Subcomm. of the S. Comm. on the Judiciary on S.J. Res. 1: Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements, and S.J. Res. 43: Proposing an Amendment to the Constitution of the United States, Relating to the Legal Effect of Certain Treaties*, 83d Cong. 58-63 (1953); FRANK E. HOLMAN, *STORY OF THE “BRICKER” AMENDMENT* 26-30 (1954).

109. See Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 319-20 (1988).

110. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995).

111. S. 520, 109th Cong. (2005).

decision, or any other action of any foreign state or international organization or agency,” other than English law at the time of the adoption of the U.S. Constitution.¹¹²

Such proposals do not sit only as hortatory suggestions. Although the Constitutional Restoration Act – with its wide wingspread – has not been enacted, another more targeted constraint is now the law of the land. In the Military Commissions Act of 2006 (MCA),¹¹³ Congress provided that, when interpreting U.S. obligations to comply with the Third Geneva Convention to provide “effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character,” Congress instructed judges that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States.”¹¹⁴

Fourth, while the isolationism within these expressions of sovereigntism renders it unattractive, the ideas that ground sovereigntism ought not to be ignored. At issue is how to achieve political and legal legitimacy. Sovereigntists insist that law, its sources and its speakers, really matters. Conflicts about the sources, the ownership of, and the connection to a particular legal regime are desirable, as they can show how deeply imbedded law is, as a social practice forging collective identity.¹¹⁵ As I detailed in an essay about “law as affiliation,” I admire the insistence of sovereigntists that law is identitarian.¹¹⁶

Moreover, while sovereigntism in the United States has tended to be isolationist, that quality is not intrinsic in the idea of sovereigntism. Another form of sovereigntism, which could be termed inclusivist or dialectical, is illustrated by the South African Constitution, insistent that South Africa’s own identity as a nation-state is tied up with its role as a respected member of the “family of nations.”¹¹⁷ One of the ways that South Africa’s Constitution builds in connections to other countries is that it directs its judges, when interpreting that constitution’s bill of rights, to consider international law and permits consideration of comparative law.¹¹⁸ South Africa’s selection of its judges to be spokespersons for its dialectical sovereigntism has been remarkably successful, at least as measured by how rapidly its constitutional judgments have become relevant within constitutional scholarly circles in the United States. Thus, sovereigntism could be inclusive and dialectical (taking one’s own laws seriously through interrogating them against other legal

112. *Id.* § 201.

113. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of titles 10, 18, and 28 of the United States Code).

114. *Id.* at 2632; 18 U.S.C. § 2441.

115. Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 *YALE J.L. & HUMAN.* 17 (2005).

116. *See* Resnik, *Law as Affiliation*, *supra* note 46.

117. *See* S. AFR. CONST. 1996 pmb1.

118. *See id.* ch. 2, § 39.

regimes and welcoming interaction and affiliation), but the United States version has been exclusive and isolationist.

Fifth, the examples of California's precautionary principle, local take up of CEDAW, and climate control make plain that formal accounts of the exercise of the national power over treaty-making are insufficient when they fail to take into account the role of local and state actors in making some treaties either feasible or irrelevant. The example of the 884 mayors joining a worldwide set of commitments is but one of many in which subnational actors share policies, sometimes resulting in de facto treaty-making, constituting a form of ratification at the local level.¹¹⁹ Furthermore, rather than bounce off *Missouri v. Holland* to claim that treaty-making is particularly problematic for states, one ought to use the examples I have set forth as reasons to rewrite treaties so as to enhance the ability of states to participate in the practices of entering and of implementing treaties. In this regard, the proposed International Violence Against Women Act is, unfortunately, currently focused on action by national and international actors. The pending legislation does not give local or state actors any role in shaping policy on violence and yet these are the very actors with a great deal of experience, often matched by their counterparts in other parts of the world, on the causes and effects of gender-based violence. Thus, federalist commitments need to be harnessed in service of treaties by considering how to bring such local action to the fore and into the frameworks of transnational provisions.

III. NEW ARTIFACTS OF FEDERALISM(S): TWENTIETH CENTURY NATIONAL STATE-BASED INSTITUTIONS

Thus far, I have drawn lessons from contemporary and older examples of translocal transnationalism to show some of the ways in which layered and interactive lawmaking has produced law in the United States. I turn now to consider newer aspects of federalist practices that are a twentieth century counterpart to what, as Holmes reminded us in *Missouri v. Holland*, had been required to turn the founders' vision into practice and which had "taken a century and . . . cost . . . much sweat and blood to prove [that the United States was] a nation."¹²⁰ Holmes' predicate was the Civil War, while what animated revisions in federalist functions in the twentieth century were the traumas of the Great Depression and of World Wars, prompting new national efforts and changing configurations of authority across the states. Over the last hundred years, a host of state-based national organizations have been

119. See Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 717-25 (2008); see also Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185 (2008).

120. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

created and begun to influence the lawmaking of the United States. I adverted to one when discussing climate control, as I pointed to a policy adopted by the U.S. Conference of Mayors (USCM), an organization created in 1933.¹²¹ That entity is one of several national organizations of local officials.

Others on that list include the National League of Cities (NLC), which was founded in 1964,¹²² the National Conference of State Legislatures (NCSL), founded in 1975,¹²³ the National Governors Association (NGA),

121. Begun in the wake of the Great Depression, the USCM aimed to enable “big city mayors [to become] an effective organizational base for lobbying Congress and coordinating with executive branch agencies.” Richard M. Flanagan, *Roosevelt, Mayors and the New Deal Regime: The Origins of Intergovernmental Lobbying and Administration*, POLITY, Mar. 22, 1999, at 415, 415-16. During the 1970s and 1980s, USCM served to provide technical assistance to cities receiving federal funds. Up until about 1980, almost 65 percent of the budget came from federal contracts. Devolution under the administration of President Ronald Reagan altered the fortunes of the Conference, and USCM staff has gone up and down over the years. See Jonathan Walters, *Lobbying for the Good Old Days*, GOVERNING, June 1991, at 35; Charles H. Levine & James A. Thurber, *Reagan and the Intergovernmental Lobby: Iron Triangles, Cozy Subsystems, and Political Conflict*, in INTEREST GROUP POLITICS 202, 212 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986). According to that volume, USCM staff numbered 5 in 1979, 100 in 1980, and 45 in 1985. *Id.* at 215. Contemporary rules provide for the USCM to include mayors of cities whose population is 30,000 or more. See United States Conference of Mayors, About the United States Conference of Mayors, <http://usmayors.org/about/overview.asp> (last visited July 2, 2008).

122. That organization emerged in 1964 from what had been called the American Municipal Association, formed in 1924 by representatives of ten cities. NAT’L LEAGUE OF CITIES, 75 YEARS: OPPORTUNITY, LEADERSHIP, GOVERNANCE: FROM LAWRENCE, KANSAS TO THE 21ST CENTURY 1 (1999). The movement to generate “leagues” of American municipalities began in the 1890s, with a Conference of State Leagues of Municipalities meeting in 1917. *Id.* at 8-9. In 1977, the NLC changed its membership rules to permit entry from any city, regardless of population size. National League of Cities, Inside NLC: History of the National League of Cities, http://www.nlc.org/inside_nlc/about_nlc/792.aspx (last visited July 2, 2008); see also DONALD L. JONES, STATE MUNICIPAL LEAGUES: THE FIRST HUNDRED YEARS (1999); Clifford W. Ham, *State Leagues of Municipalities and the American Municipal Association: An Experiment in Coöperation Among Municipal Officials*, 31 AM. POL. SCI. REV. 1132 (1937). The NLC’s mission is to “strengthen and promote cities as centers of opportunity, leadership, and governance,” and it supports and represents 19,000 cities, with dues paid by 1,600 municipalities of all sizes. National League of Cities, Inside NLC: About NLC, http://www.nlc.org/INSIDE_NLC/aboutnlc.aspx (last visited July, 2 2008).

123. The NCSL was formed by a merger of the National Legislative Conference, the National Conference of State Legislative Leaders, and the National Society of State Legislators. See Karl T. Kurtz, *The History of Us*, ST. LEGISLATURES MAG., July-Aug. 1999, available at <http://www.ncsl.org/programs/pubs/799ncsl.htm>.

founded in 1908,¹²⁴ the National Association of Attorneys General (NAAG), founded in 1907,¹²⁵ the National Association of Counties (NACo), founded in 1935,¹²⁶ the Conference of Chief Justices (CCJ), founded in 1949,¹²⁷ the National Conference of Commissioners on Uniform State Laws (NCCUSL), founded in 1889,¹²⁸ the International City/County Management Association (ICMA), founded in 1914,¹²⁹ the National Association of Towns and

124. The NGA was founded in 1908 as the “Governor’s Conference” and became active in federal policies during the New Deal and World War II. John Douglas Nugent, *Federalism Attained: Gubernatorial Lobbying in Washington as a Constitutional Function* 143-45 (May 1998) (unpublished Ph.D. dissertation, University of Texas) (on file with ProQuest, AAT 9838067). The NGA is a “bipartisan organization of the nation’s governors” whose mission is to “promote[] visionary state leadership, share[] best practices and speak[] with a unified voice on national policy.” Nat’l Governors Ass’n, *About the National Governors Association*, <http://www.nga.org/portal/site/nga/menuitem.cdd492add7dd9cf9e8ebb856a11010a0/> (last visited July 3, 2008).

125. NAAG’s members are the Attorneys General of the fifty states and the District of Columbia and the chief legal officers of the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands. Nat’l Ass’n of Attorneys Gen., *About NAAG*, http://www.naag.org/about_naag.php (last visited July 3, 2008). The United States Attorney General is an honorary member. *Id.* NAAG’s mission is “[t]o facilitate interaction among Attorneys General as peers” and “[t]o facilitate the enhanced performance of Attorneys General and their staffs.” *Id.* In recent times, NAAG has focused on coordinated litigation strategies across states. *See* Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POLITICS 525, 540 (1994).

126. NACo, headquartered in Washington, D.C., lobbies on behalf of local governments and provides them with research, legislative, and technical expertise. It describes its membership as including about 2,000 of the nation’s 3,066 counties. Nat’l Ass’n of Counties, *About NACo*, http://www.naco.org/Template.cfm?Section=About_NACo (last visited July 3, 2008); *see also* Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1, 6-7 (2008).

127. CCJ was founded in 1949 in St. Louis, Missouri, and grew out of informal discussions of state chief justices at American Law Institute and American Bar Association meetings. NAT’L CTR. FOR STATE COURTS, *HISTORY OF THE CONFERENCE OF CHIEF JUSTICES* 13, 16-17 (1993), *available at* <http://ccj.ncsc.dni.us/HistoryPt1.pdf>.

128. NCCUSL is the one organization on this list that was formed before the twentieth century. In 1889, the American Bar Association passed a resolution calling for the need to develop uniform laws. The resulting group, NCCUSL, first met in 1892 and took as models for its work organizations like the Rome Institute and the Hague Conference, aiming to draft laws to be adopted through voluntary state action. Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 234-36 (1965).

129. ICMA began in 1914 as the “International City Managers Association” comprised of executives of cities using the council-manager form of government. At its founding, about thirty-two cities fit that bill. In 1969, ICMA broadened its scope beyond council-manager governments and changed its name to “International City

Townships (NATaT), founded in 1963,¹³⁰ and the National Congress of American Indians (NCAI), founded in 1944.¹³¹ Some coordination among these groups comes from a group called the Council of State Governments (CSG), founded in 1933.¹³²

As their names describe, they are generally organized not by an interest (such as climate control or women's rights) but by the political units of this federation – the level of jurisdiction (federal, state, county, city) or the kind of office (governor, attorney general, legislator, mayor). Describing themselves

Management Association.” In 1991, the organization again enlarged its scope, and today reports that 3,003 local governments—totaling nearly 9,000 individual members—participate. ICMA, History of ICMA and the Local Government Management Profession, <http://icma.org/main/bc.asp?bcid=104&hsid=1&ssid1=17&ssid2=22&ssid3=276> (last visited October 26, 2008); ICMA, Who We Are, <http://icma.org/main/bc.asp?bcid=656&hsid=1&ssid1=17&ssid2=22> (last visited October 26, 2008); see also ICMA CONST. art. VIII, available at <http://icma.org/main/bc.asp?bcid=35&hsid=1&ssid1=17&ssid2=22&ssid3=167#8> (describing eligibility criteria for ICMA membership).

130. NATaT began in 1976 with annual conventions, and then developed an agenda in the later 1970s as an advocate to the federal government on behalf of smaller communities. Rochelle L. Stanfield, *Toward an Urban Policy with a Small-Town Accent*, PUBLIUS, Winter 1979, at 31, 37; see Donald C. Menzel, *Collecting, Conveying, and Convincing: The Three C's of Local Government Interest Groups*, 50 PUB. ADMIN. REV. 401, 404 n.4 (1990); Beverly A. Cigler, *Small City and Rural Governance: The Changing Environment*, 44 PUB. ADMIN. REV. 540, 544 (1984). NATaT defines “smaller communities” as those with 25,000 or fewer residents and often focuses on rural issues. Its membership is currently about 13,000. Nat'l Ass'n of Towns & Townships, About Us, http://www.natat.org/about_us.html (last visited July 4, 2008).

131. The NCAI “serves to secure for ourselves and our descendants the rights and benefits to which we are entitled; to enlighten the public toward the better understanding of the Indian people; to preserve rights under Indian treaties or agreements with the United States; and to promote the common welfare of the American Indians and Alaska Natives.” Nat'l Congress of Am. Indians, History, <http://www.ncai.org/About.8.0.html> (last visited July 4, 2008). Specific issues in which NCAI is involved include “Protection of programs and services to benefit Indian families, specifically targeting Indian Youth and elders[;] Promotion and support of Indian education, including Head Start, elementary, post-secondary and Adult Education[; and] Support of environmental protection and natural resources management.” *Id.*

132. CSG, which describes its mission as “promot[ing] excellence in decision-making and leadership skills and champion[ing] state sovereignty,” grew out of the American Legislators' Association and seeks to facilitate joint action and collaboration. See Council of State Gov'ts, Frequently Asked Questions, <http://www.csg.org/about/faqs.aspx> (last visited July 4, 2008); E. Norman Sims, *The Council of State Governments: A National Information Provider*, 3 GOV'T INFO. Q. 407, 407-08 (1986).

as bipartisan and mirroring the tiered structure of American federalism,¹³³ these entities sit somewhat in between the classical NGO and the government as they are voluntary organizations of government officials supported by a mixture of public and private funds.

These governmental “interest groups” were formed during the twentieth century to protect localities from national encroachments, to forward municipal agendas in Washington, and to engender contacts for similarly situated individuals. With the nationalization and globalization of the economy, they have broadened their horizons.¹³⁴ Today, they are entering into accords and forging links with other subnational entities around the world in a fashion that one commentator argued went beyond the ability of the national government to “control, supervise, or even monitor.”¹³⁵

Much of the local work is aimed to promote trade and tourism, but a subset reaches a wider array of issues. As a group of researchers assessing state legislation in 2001 and 2002 put it, state governments are “taking on the world” as they consider hundreds of bills related to globalization, trade, immigration, climate control and human rights.¹³⁶ What these researchers also found was that “[l]egislative policy activists often belong to networks and organizations that link legislators across state boundaries and that aid in the diffusion of policy ideas from state to state.”¹³⁷ Further, while some international activities involve officials going abroad to enhance economic opportunities for their specific locality, other efforts entail the development of policy agendas that produce resolutions and lobbying addressed either horizontally (towards the same level of government or states) or vertically (towards the national government).¹³⁸

In terms of their functions, networking is one obvious purpose, which enables them to create and provide a market brokering information.¹³⁹ As one group, the National Conference of State Legislatures puts it, were it not to

133. See Theda Skocpol, Marshall Ganz & Ziad Munson, *A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States*, 94 AM. POL. SCI. REV. 527 (2000).

134. See Bertram Johnson, *Associated Municipalities: Collective Action and the Formation of State Leagues of Cities*, 29 SOC. SCI. HIST. 549, 558 (2005).

135. EARL. H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 128 (1998).

136. Timothy J. Conlan, Robert L. Dudley & Joel F. Clark, *Taking on the World: The International Activities of American State Legislatures*, PUBLIUS, Summer 2004, at 183.

137. *Id.* at 196.

138. For example, as of 2000, four states and twenty-six municipalities had enacted economic sanction laws, aimed at Burma, Nigeria, and other countries, and those parallel provisions had been developed through networks of local officials and activists. See Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts' "Burma Law"*, 115 POL. SCI. Q. 353, 357 (2000).

139. See generally Sidney Tarrow, *Transnational Politics: Contention and Institutions in International Politics*, 4 ANN. REV. POL. SCI. 1 (2001).

exist, “we would have to invent it,”¹⁴⁰ in order to discharge its “critical role in supporting the communication and professional development needs of [state] legislative staff.”¹⁴¹ In short, such organizations can be both clearinghouses and repositories, as well as sometimes research and educational institutions.

Through what information they collect, the conferences they run, and the services that they provide, these organizations can create norms for office holders and shape policy preferences.¹⁴² For example, the National Association of Attorneys General had, as of the 1990s, adopted more than one hundred policies on issues such as antitrust, civil rights, consumer protection, the environment, and health.¹⁴³ More generally, these groups model behavior as they cooperate and pool resources.¹⁴⁴ And, as I have shown in the context of the Mayors’ efforts on climate control, they are conduits for border crossings – state to state, state to federal, and international.¹⁴⁵ As was also detailed in the context of Kyoto and CEDAW, some of the initiatives are expressive, aimed at shifting national policy, while others are programmatic, generating obligations.

I should underscore that translocal organizations are not unique to the United States and moreover, the alliances being made by these organizations include forging ties with their counterparts in other countries.¹⁴⁶ Subnational relationships are often focused on particular concerns, such as cities’ networks through climate control across the United States or province-state relationships, among states in the United States and counterparts in Canada or Mexico or with tribes.¹⁴⁷ The example of migratory birds embodied in *Missouri v. Holland* has a modern day counterpart in concerns about how fencing the borders of the United States would affect the movement of animals. In February of 2008, the United States-Mexico Sister Parks Conference held its first conference to discuss how to “streamline cross-border communications” and to overcome differences so as to “combine resources and protect similar, often related, natural and cultural resources.”¹⁴⁸

140. Kurtz, *supra* note 123.

141. *Id.*

142. See Michele M. Betsill & Harriet Bulkeley, *Transnational Networks and Global Environmental Governance: The Cities for Climate Protection Program*, 48 INT’L STUD. Q. 471, 475-77 (2004).

143. Joseph F. Zimmerman, *Interstate Cooperation: The Roles of the State Attorneys General*, PUBLIUS, Winter 1998, at 71, 75.

144. See generally Tarrow, *supra* note 139.

145. See, e.g., GLOBAL NETWORKS, LINKED CITIES (Saskia Sassen ed., 2002).

146. See Nicole Bolleyer, *Federal Dynamics in Canada, the United States, and Switzerland: How Substates’ Internal Organization Affects Intergovernmental Relations*, PUBLIUS, Fall 2006, at 471.

147. See Hollis, *supra* note 101.

148. See *Conference Ends with Plans for Action*, GRAND CANYON NEWS, Mar. 12, 2008, at 1, available at <http://www.grandcanyonnews.com/main.asp?SectionID=7&SubSectionID=7&ArticleID=7192&TM=84271.31>.

What makes these translocal institutions legally and politically intriguing is that they are *national* but not part of the *federal* government. They are also deeply *federalist* in the sense that these entities are themselves artifacts of U.S.-style federalism, as they obtain both their identity and some of their import from the fact of federalism. A focus on translocalism requires reconsideration of some of the stock precepts of legal federalism. Many legal discussions of federalism posit each state as a single, isolated actor, always to be treated on an equal footing with other states and sometimes in competition with another state through races to the bottom and now, with climate control, races to the top.

Rarely is discussion had of the many joint actions undertaken by states, either at the formal level of the Constitution's "Compact Clause" requiring congressional approval,¹⁴⁹ or more frequently through coordinated initiatives some of which become multistate executive orders and other informal administrative agreements.¹⁵⁰

The term "horizontal federalism" – state-to-state interaction – has recently gathered some attention within the legal academy,¹⁵¹ but more of the focus is on single state-to-state exchanges (such as issues related to the Full Faith and Credit Clause) and less on the role played by local officials working in concert.¹⁵² Turning to the "vertical dimensions," one finds discussions of "cooperative federalism," a term denoting national programs with state or

149. See U.S. CONST. art. I, § 10, cl. 3. A small amount of legal literature addresses the Compact Clause. Felix Frankfurter led the way. See Frankfurter & Landis, *supra* note 57; see also Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997); Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465 (1996); Hollis, *supra* note 101. Similarly, the political science literature is not rich with studies of these organizations and their import. See Conlan, Dudley & Clark, *supra* note 136; see also Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RES. & THEORY 535, 539 (2004). Bowman noted the lack of research as she reported on her study of state-to-state cooperation that tracked the number of compacts not related to borders in which states join. States joined from fourteen to thirty-two such compacts, many of which were bilateral. For example, as of 1998, forty-three states were members of the Drivers' License Compact, to exchange information about nonresident traffic violation drivers. *Id.* at 540. Bowman sought to identify factors sparking cooperation but none that she investigated (party-affiliation, policy liberalism, neighboring state behavior, and government capacity) were predictive.

150. Bowman, *supra* note 149, at 544-45 (noting the increasing popularity of this mode of coordination, which could be quickly negotiated and amended).

151. See, e.g., Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001).

152. Bowman, *supra* note 149, at 535.

city-based implementation or shared regulatory authority.¹⁵³ One also can find some interest in regional efforts.¹⁵⁴ But not much attention is paid to federalist practices that cross both vertical and horizontal dimensions at the same time, or – as Daniel Farber and Hari Osofsky have each suggested – “diagonal” marks on a federal grid.¹⁵⁵

Translocal action requires us to reappraise the propriety of conceiving of states in the singular rather than appreciating their role as a collective national force. Instead of models of exclusive areas of competencies and categorical classifications, we should be focused on the interdependencies, sometimes empowering of each other.¹⁵⁶ And, rather than federalism being a barrier to the “foreign,” federalist organizations serve as mechanisms by which to domesticate the “foreign.”

To provide one example, consider the National League of Cities (NLC), well known to people close to the law of federalism, for that name – “*National League of Cities*” – appears in another famous case in which a locality invoked the Tenth Amendment to claim and (unlike the outcome of *Missouri v. Holland*) to win an exemption from federal regulation.¹⁵⁷ At the time, the NLC was fighting federal regulation of labor and hours, which could be characterized as a conservative position unwelcoming of regulation as well as one committed to local autonomy about how to allocate taxpayer dollars.¹⁵⁸

153. See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (focusing on the role of the federal government in empowering localities vis-à-vis the states in which they sit); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091 (2008).

154. See, e.g., Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006).

155. Daniel A. Farber, Remarks at the University of Arizona James E. Rogers College of Law: Conference on Federalism and Climate Change (Feb. 11, 2008); Hari M. Osofsky, *Is Climate Change “International”? Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. (forthcoming 2009), available at <http://ssrn.com/abstract=1238622> (August 19, 2008, cited with permission); Osofsky & Levit, *supra* note 95.

156. See Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007).

157. *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

158. See *Nat’l League of Cities*, 426 U.S. at 839 (“The Act thus imposes upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees engaged in interstate commerce. . . . Challenging these 1974 amendments in the District Court, appellants sought both declaratory and injunctive relief against the amendments’ application to them. . . .”). A few years later, the United States Supreme Court explicitly overruled the reasoning in *National League of Cities* that exempted states from federal labor regulation, finding that case’s method of appraising a particular governmental function as “integral” or “traditional” to be “unsound in principle and unworkable in practice.” *Garcia*, 469 U.S. at 546-47.

But while the National League of Cities then appeared parochial in its concerns, the organization has also been an important voice for local-global networks, some of which can have regulatory bite.¹⁵⁹ The transnational activity grew up in part during the 1950s, when the NLC became active in what it termed the Sister Cities Program. During the Cold War, the Eisenhower Administration tried what it called “people to people” diplomacy to help promote capitalism in the conflict with communism. Given that this symposium is sited in Missouri, I use the thirteen participating cities in the state¹⁶⁰ as exemplary of the work of Sister Cities. Those Missouri cities have formally affiliated with foreign cities in several countries, including China, Ecuador, Germany, Japan, Luxembourg, Romania, South Korea, and many more.¹⁶¹ What one finds in Missouri is replicated around the United States. Sister Cities International (its current name) reports linking 2,500 communities in 126 countries.¹⁶²

The National League of Cities has further extended its global focus by becoming active in a transnational network called United Cities and Local Governments (UCLG),¹⁶³ which promotes human rights¹⁶⁴ by working as a

159. See FRY, *supra* note 135; see also Earl H. Fry, *State and Local Governments in the International Arena*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 118 (1990). Information about how to fund such work can be found at U.S.-ASIA ENVTL. P'SHIP, FEDERAL RESOURCE GUIDE FOR SUPPORTING STATE INTERNATIONAL ENGAGEMENT: COPING, COMPETING, AND COOPERATING IN A GLOBAL ECONOMY (2002), available at http://pdf.dec.org/pdf_docs/PNACR090.pdf.

160. The Missouri cities are: Columbia, Florissant, Independence, Joplin, Kansas City, Lee's Summit, Liberty, North Kansas City, Rolla, Springfield, St. Charles, St. Louis, and Wentzville. See Sister Cities Int'l, Online Directory: Missouri, USA, <http://www.sci-icrc.org/icrc/directory/usa/MO> (last visited November 9, 2008).

161. The counterpart cities are: K'ut'aisi, Georgia; Hakusan (Matto), Higashimurayama, Isesaki, Kawahigashi, Kurashiki, and Suwa, Japan; Sibiu, Romania; Suncheon City, South Korea; Nanjing, Qingdao, and Xi'an, China; Lesedi, South Africa; Arusha, Tanzania; Hannover, Stuttgart, Sonderhausen, and Ludwigsburg, Germany; Guadalajara, Tlaquepaque, San Nicolas de los Garza, and Morelia, Mexico; Metz and Lyon, France; Port Harcourt, Nigeria; Ramla, Israel; Seville, Spain; Freetown, Sierra Leone; Tainan City and Taipan, Taiwan; Diekirch and Esch-sur-Alzette, Luxembourg; Bologna, Italy; Galway, Ireland; Bogor, Indonesia; Georgetown, Guyana; St. Louis, Senegal; Samara, Russia; Szczecin, Poland; Puyo, Ecuador; Bethlehem, Palestine Authority. *Id.*

162. Sister Cities Int'l, Frequently Asked Questions, <http://www.sci-icrc.org/sci/aboutsci/faqs> (last visited November 9, 2008). NLC ran the Sister Cities Program until a separate organization was created. See James Brooks, *NLC, Sister Cities International Enhancing Ties*, NATION'S CITIES WKLY., Mar. 26, 2001, at 6.

163. UCLG resulted from the merger of the International Union of Local Authorities (begun in 1913), the World Federation of United Cities, and Metropolis. See Donald J. Borut, *Stepping up to the International Agenda*, NATION'S CITIES WKLY., Jan. 19, 1998, at 2; United Cities & Local Gov'ts, 2004 Founding Congress, <http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=103> (last visited July 4, 2008).

“local government partner of the United Nations.”¹⁶⁵ NLC initiatives concern the provision of adequate housing and education, opportunities for inclusiveness, and respect for diverse cultures, and the problems of “inequalities in our cities.”¹⁶⁶ Thus, once framed in terms of its work to insulate cities from national regulations of wages, the NLC has turned more recently to other issues, some of which could be classified as falling under the rubric of human rights.

In that development of the NLC comes another lesson. The posture of a group can change depending on its leadership, membership, and particular problems at a given time. Indeed, the political stances of organizations keyed to any level of government ought not to be assumed to be inherently stable or necessarily tilted toward one direction of the political spectrum. Above, I cited examples of local policies on toxic toys, CEDAW, and global warming, all of which could be termed progressive or liberal. I could have run a parallel set of examples aimed at prohibiting same-sex marriages or abortions, which could be characterized as conservative. Some cities are protective of immigrants (such as New Haven, a “sanctuary city”) whereas other localities (such as some in Pennsylvania and in Arizona) are renowned for putting into place anti-immigrant initiatives of remarkable scope.¹⁶⁷ Moving to litigation, in virtually all of the Supreme Court’s major federalism cases, state-based actors filed briefs on both sides, arguing that a particular provision violated or did not violate congressional power.¹⁶⁸ As social scientists have mapped, both liberal and conservative social movements are part of transnational efforts attentive to the impact of interaction across borders on rights-making.¹⁶⁹

Yet I want to raise questions about the posture to be taken by advocates seeking to expand rights by having the United States participate in transna-

164. United Cities & Local Gov’ts, Promoting Women in Local Decision-Making, <http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=23> (last visited July 4, 2008) (discussing the UCLG coordination of local governments’ contribution to the U.N. Women’s Conference on Beijing +10); see also Donald J. Borut, *Local Officials from Around the World Meet in China*, NATION’S CITIES WKLY., June 27, 2005, at 5.

165. Guy Kervella, *Unification of IULA and UTO Creates Largest International Local Government Association*, CITY MAYORS, <http://www.citymayors.com/orgs/unitedcities.html> (last visited July 4, 2008).

166. See NAT’L LEAGUE OF CITIES, FY 2004 STRATEGIC PLAN UPDATE (2004), available at <http://www.nlc.org/ASSETS/F1F9EA5BDCFD45E2A5F1A07AC11DB8C0/stratplanfy2004.doc> (listing this as priority number eight for the NLC in fiscal year 2004).

167. See *Arizona Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008); *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

168. See Judith Resnik & Joshua Civin, *When States Disagree: Discourse, Discord, and Disaggregation in the Supreme Court’s Federalism Jurisprudence* (2005) (unpublished manuscript, on file with author).

169. See Steven Teles & Daniel A. Keeney, *Spreading the Word: The Diffusion of American Conservatism in Europe and Beyond*, in *GROWING APART? AMERICA AND EUROPE IN THE 21ST CENTURY* 136 (Jeffrey Kopstein & Sven Steinmo eds., 2007).

tional agreements. My concern is that one needs to consider the effects of such connections, both locally and abroad. I noted in discussion of CEDAW the enthusiasm of many to have the United States ratify that convention, in the hopes that it would bring “home” some of CEDAW’s more expansive provisions. But a possibility exists that, instead, the United States might try to export its views on equality, its focus on intent to discriminate rather than impact, and its anti-affirmative action vision rather than welcome the importation of transnational equality precepts. With membership comes forms of power which the United States is unlikely to be shy in using to assert its own views of equality law. Were the United States to be a member, for example, it could try to control who sits on the committee of twenty-three charged with CEDAW’s interpretation, oversight, and implementation, and to rein in some of their views.

In contrast, the local take up of CEDAW – through efforts in San Francisco and elsewhere – may be more generative of policy changes within the United States and less risky for those outside the country. Furthermore, embracing precepts through local lawmaking is a powerful way to bring them “home” and to imbed them through legal commitments made at that level.¹⁷⁰ This focus on local takeup prompts a parallel suggestion about how to consider the pending effort to enact legislation focused on violence against women around the world. I suggest a rewriting of the proposed IVAWA to require the national “Coordinator” to learn from and consult with local organizations and authorities in both the United States and abroad so as to tailor efforts to reduce violence against women to different contexts. Further, the Coordinator ought to be charged with helping to link localities transnationally and provided with funding to support such connections. In other words, we should apply the “Precautionary Principle” to lawmaking, and we should explore how to develop and to ground new ideas in the many layers of federations both here and abroad.

IV. CONSTITUTIONAL REGULATION OR TRANSLOCAL NATIONAL COLLABORATION

I have just argued that American federalism is a major conduit for international and foreign influences to affect law and policy here. Further, I have argued that new developments in federalism – the growth of translocal organizations – ought to require a reconception of U.S. federalism to acknowledge the joint venturing that dots and alters its matrix. But, just because transnationalism (a) has a long history, (b) is unstoppable, and (c) has, on some metrics, political legitimacy, does not exhaust the questions that need to be considered. How are we to assess these translocal incorporative efforts? Are they good for federalism? Generative of wise policies? In need of regulation?

170. See generally Resnik, *Law as Affiliation*, supra note 46.

From a perspective shaped by the U.S. Constitution's federalist structure, the twentieth-century developments of translocal organizations deserve to be celebrated. In many respects, these organizations are exemplary of federalist ambitions for they embody federalism's political commitment to redundancy and multiple levels of authority, undermining central power. By amplifying state and local voices through these networks and thereby generating political capital for the jurisdictional officeholders they denote, the views of localities in the creation of national norms are heard.¹⁷¹ These institutions work in service of the national interests of our constitutionally federated structure.¹⁷²

These organizations can also be helpful in shaping national legislation. As one study observed, their output provides useful information – signals – to Congress about the role it ought to play. One commentator argued, for example, that, if states are willing to adopt uniform laws on a particular issue, Congress can “discern whether the states, through their regulatory regimes, are creating net, negative social costs and whether uniform regulations, uniformly adopted, are capable of remedying this problem.”¹⁷³

In addition to being creative sources of information within a federation, organizations like the U.S. Conference of Mayors and the National Governors Association alter and thicken the structural account of federalism because they simultaneously sit both as local and as national organizations, appropriately located on both the horizontal and vertical dimensions of federalism. What they teach is that many problems can be addressed through entities that are not “federal” but can nonetheless generate nation-wide responses through coordination of state-based officials. We might thus extrapolate from them to provide other new organizational structures. For instance, rather than turn only to the federal courts for inter-jurisdictional disputes, we could develop national courts that are not federal but are rather shaped specifically to deal with problems crossing state borders. Instead of federalizing state-based class actions as Congress did in the Class Action Fairness Act of 2005 (CAFA),¹⁷⁴ for example, we could create regional institutions comprised of

171. Johnson also notes how cooperation helps to produce collective proposed solutions and how problems that are shared prompt opportunities for cooperation. Johnson, *supra* note 134, at 570.

172. See generally Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

173. Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 AM. BUS. L.J. 41, 80 (2000).

174. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.); see Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008) [hereinafter Resnik, *Lessons in Federalism*].

judges from states around the nation for consumer and mass torts that cross the country.

Furthermore, these state-based government-official organizations can be responsive to a perceived “democratic deficit” within the U.S. Senate, which, in light of population and resource disparities among states, is criticized as failing on various metrics and particularly as generating unfair bargaining conditions.¹⁷⁵ National organizations of state actors that are not run by the federal government offer opportunities to create power that could compensate for some of those imbalances – or, of course, could replicate them. Further, as one of many sets that form a web of associative activity that is part of a fabric of democracy,¹⁷⁶ we could conceptualize their work within pluralist theory as improving deliberative democracy by bringing in not only more voices but also a particularly interesting set of voices.

These are, after all, “interest groups” whose “special interest” derives from their functions – job level/jurisdiction – as public servants, and these groups are generally committed to bipartisan functionality, seeking to distribute benefits at their particular organizational level rather than get special and specific earmarks for a given locality. They could both enhance governmental competency as well as help to shape commitment to a common good more than do associations or private single-issue groups. Pressed by constituents with needs and functioning as administrators having to make good on promises to deliver services, these organizations could be a font of many kinds of policy innovations, responsive to the dysfunction found at the national level, or again, giving evidence that such problems are replicated at all echelons of government.

Translocal work can also offer opportunities for fine-tuning strategies for implementation that may be lacking when policies are promulgated from a distance. Local- or state-based actors have different stakes in the workings-out of programs; they come with knowledge and expertise, and their own personal political capital may be implicated through successes or failures. They can serve as “feedback loops,”¹⁷⁷ proposing modifications of policies as well as being able to teach each other about compliance.

Yet, “in the name of federalism,” one can also level criticisms about these organizations. Federalism is argued to be a desirable political structure because it locates power at multiple levels and in theory produces variety and policy competition. Paul Berman, for example, has extolled the desirability

175. See Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001).

176. See generally JOSHUA COHEN & JOEL ROGERS, ASSOCIATIONS AND DEMOCRACY 12-21 (1995).

177. See Theda Skocpol, *The Tocqueville Problem: Civic Engagement in American Democracy*, 21 SOC. SCI. HIST. 455 (1997); see also Skocpol, Ganz & Munson, *supra* note 133.

of “pluralist” models of law;¹⁷⁸ Robert Ahdieh has argued for regulatory coordination and diversity;¹⁷⁹ and long ago, Robert Cover made a somewhat different point as he described the utilities of jurisdictional redundancy.¹⁸⁰ In contrast, the sharing of policies could generate uniformity – as is easily exemplified by the National Conference of Commissioners on Uniform State Laws, aiming to do just that. If federalism is valued for its production of diverse responses tailored to local conditions, translocalism may in practice damp down this diversity – or provide evidence, from the “bottom up,” that diversity has less uses in certain areas.¹⁸¹

Moreover, the development of these organizations raises questions for political and social movement theory. A significant body of literature focuses on “networks” of activists bringing parallel and coordinated initiatives across a spectrum of issues.¹⁸² These “transnational advocacy networks” (TANs) are assumed to be spawned by NGOs – nongovernmental organizations, such as those complained about in the COMPASS Report. A good many commentators explore how such “norm entrepreneurs” in TANs and NGOs affect civil society and lawmaking.

But one ought not call the National League of Cities and the National Association of Attorneys General “NGOs,” in that they are groups of persons who are empowered through their public personas as state officials and not through their private commitments and interests. The organizations that bear their names have political legitimacy because they “represent” (in some fashion) important facets of political institutions. These organizations take positions and generate some collective actions by state officials. Yet they are not exactly “GOs” – governmental organizations – in that they are voluntary and in some sense “private” organizations which speak for their own entity but do not bind the government units from which their officials come. They are both public and private in a financial sense as well, in that their resources are generally a mix of support from public and private grants as well as corporate

178. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007).

179. See, e.g., Robert B. Ahdieh, *From Federal Rules to Intersystemic Governance in Securities Regulation*, 57 EMORY L.J. 233 (2007); Robert B. Ahdieh, *The Dialectical Regulation of Rule 14a-8: Intersystemic Governance in Corporate Law*, 2 J. BUS. & TECH. L. 165 (2007); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006).

180. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); see also Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

181. See Razook, *supra* note 173, at 51-60.

182. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 2 (1998) (describing “relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services”).

sponsorships. As one scholar of municipal associations put it, they are “[p]art interest groups, part associations, part institutions of government.”¹⁸³ Thus, along with my colleagues Joshua Civin and Joseph Frueh, I have offered another term – transnational organizations of government actors, or TOGAs – to capture the distinctive attributes of these entities, as well as to argue for their recognition in law and consideration of their regulation by law.¹⁸⁴

TOGAs are surely “interest” groups but how do they (or we) define their “interest”? A charter, mandate, or realm of concern? Should we see these groups as agents or principals?¹⁸⁵ How do they decide how to lobby for the “mayors” or “governors”? These are familiar questions of bonding and monitoring in organizational, political, and class action theory.¹⁸⁶ Some of these questions could prompt the localities from which the representatives come to seek disclosure, transparency, or accountability, even as one needs to leave room for associative freedoms for certain forms of collective action.

Attention ought not only prompt questions of regulation but also of subsidy and support. For example, Congress currently provides federal grants to the National Center for State Courts as well as a budget to the State Justice Institute, an organization that works across states on research and policy development.¹⁸⁷ As one sees the generative capacity of translocalism, one can consider how to shape national policies to fund their work or to provide a place for them at the “table” as specially situated spokespersons, akin to the U.N.-specified role for NGOs or to the status provided to states, recognized

183. Johnson, *supra* note 134, at 550. For a mapping of multiple constituencies and forms of accountability on the international front, see Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism* (Inst. for Int’l Law & Justice, Working Paper No. 2007/4, 2007).

184. See Resnik, Civin & Frueh, *supra* note 119, at 769-86.

185. For example, under the aegis of the National Association of Attorneys General, a “Multistate Antitrust Task Force” was created to develop guidelines for state-based enforcement of antitrust provisions. See Thomas Greene & Robert L. Hubbard, *State Antitrust Enforcement Distribution Restraints*, at 13-15 (2001) (prepared for the Practising Law Institute), available at <http://www.oag.state.ny.us/bureaus/antitrust/pdfs/pli12-01final.pdf>. For other discussions regarding the coordinated efforts of these officials, see Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001); Zimmerman, *supra* note 143; Clayton, *supra* note 125; Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989).

186. See Resnik, *Lessons in Federalism*, *supra* note 174.

187. See Nat’l Ctr. for State Courts, Government Relations Office, Federal Funding Report, available at http://www.ncsconline.org/D_Gov/govfederalfundreport.html (last visited July 4, 2008); State Justice Inst., SJI Grants, <http://www.sji.gov/grants.php> (last visited July 4, 2008). The 2009 federal budget request by the State Justice Institute is \$5,389,000. See State Justice Inst., Fiscal Year 2009 Budget Request, at 3 (Jan. 2008), available at http://www.statejustice.org/PDF/FY2009_Budget_Request.pdf.

by legal doctrine to have specific protection as plaintiffs or defendants in federal litigation.¹⁸⁸

V. THE IMPULSE TO PREEMPT

Neither a focus on subsidies or regulation of TOGAs is on the screen, but another kind of regulatory question has been brought to the fore because of litigation. The issue is whether some of the outputs of translocal organizational initiatives are “legal” – in the sense of permissible under the United States Constitution as well as under state precepts about internal powers of cities or counties. Return once again to this symposium's touchstone – *Missouri v. Holland*. There, the question was whether the federal government was disabled from entering into treaties affecting domestic use of migratory birds because states had exclusive authority. Today we face the opposite scenario, in that the argument is made that localities are precluded from passing local ordinances – including those with which I began, the ban on toxic toys in California¹⁸⁹ – as well as other state and local legislation focused on divestment of assets from Darfur or on rejection of goods made from forced labor in Burma. These various provisions are challenged on the same grounds – that the national government has exclusive authority to regulate.

One case, *National Foreign Trade Council, Inc. v. Giannoulis*,¹⁹⁰ involving the decision by Illinois's legislature to divest from the Sudan, is exemplary. There, a federal trial judge decided that the state action to divest assets had impermissibly intruded on the federal government's power. To do

188. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007).

189. As referenced *supra* note 17, in October of 2006, California Retailers Association, California Grocers Association, American Chemistry Council, Citikids Baby News, Inc., and Juvenile Products Manufacturers Association filed a complaint in California state court against the City and County of San Francisco and argued that the local ban on phthalates in children's toys was preempted by state law. See Complaint for Declaratory and Injunctive Relief, *Citikids Baby News, Inc. v. San Francisco*, No. CGC-06-457303 (Cal. Super. Ct. Oct. 25, 2006). That litigation ended when the city amended its ordinance. See Stipulation and Order Regarding Hearing of Pending Application for Preliminary Injunction, *Citikids Baby News, Inc. v. San Francisco*, No. CGC-06-457303, at 2 (Cal. Super. Ct. Jan. 8, 2007). Parallel federal litigation over San Francisco's ban on phthalates remains, as of this writing, pending. The American Chemistry Council, Toy Industry Association, Ambassador Toys LLC, and California Chamber of Commerce filed its challenge in November of 2006. See Complaint for Declaratory Judgment and Injunctive Relief, *Toy Indus. Ass'n v. San Francisco*, No. C-06-7111-SC (N.D. Cal. Nov. 16, 2006). But the 2008 Consumer Product Safety Improvement Act, see *supra* note 19, provided that its limited regulation of phthalates did not preclude state regulation.

190. 523 F. Supp. 2d 731 (N.D. Ill. 2007).

so, the court relied on what some have called “implied, dormant foreign affairs preemption.”¹⁹¹ As the opinion explained:

Congress gave the president broad leeway to impose, or decide not to impose, an array of sanctions. The Illinois Sudan Act, however, does not allow for such flexibility. It does not allow for a temporary suspension of sanctions or a specific waiver, even if the president deemed such an action to be in the national interest.¹⁹²

The reason to use adjectives of “implied” and “dormant” in connection with the term “foreign affairs preemption” comes from the fact that this doctrine is extrapolated from the relatively infrequent use of the word “foreign” in the United States Constitution.¹⁹³ As the Darfur decision illustrates, the federal judiciary has been both deferential to claims of national preemption and generative in its own right, shaping a legal regime preferring the singularity of national power through judicial expansion of the doctrines of foreign affairs preemption, dormant commerce clause preemption, and federal agency preemption.¹⁹⁴

Undergirding these decisions are questions of separation of powers, judicial role, and federalist commitments. As is likely plain from my rejection of categorical federalism, in my view, as a matter of constitutional law, many actions by local and state entities that have national, foreign, and transnational effects are permissible. The text of the Constitution is radically

191. William Fletcher, Remarks at the University of Arizona James E. Rogers College of Law: Conference on Federalism and Climate Change (Feb. 11, 2008); *see also* William A. Fletcher, Commentary, 50 ARIZ. L. REV. 935, 937-38 (2008).

192. *Giannoulas*, 523 F. Supp. 2d at 741.

193. That word appears in the United States Constitution six times. *See* U.S. CONST. art I, § 8, cl. 3 (“The Congress shall have power . . . [t]o regulate Commerce with *foreign* nations” (emphasis added)); *id.* cl. 5 (“The Congress shall have power . . . [t]o coin Money, regulate the Value thereof, and of *foreign* coin” (emphasis added)); *id.* § 9, cl. 8 (“No title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall . . . accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or *foreign* state.” (emphasis added)); *id.* § 10 cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a *foreign* Power” (emphasis added)); *id.* art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and *foreign* States, Citizens, or Subjects.” (emphasis added)); *id.* amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any *Foreign* State.” (emphasis added)).

194. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008); *Watters v. Wachovia Bank*, 550 U.S. 1 (2007); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

under-directive and much of the development of the idea of an exclusive realm for executive or congressional action comes from judicial extrapolation that I think is wrong as matter of doctrine and wrong as matter of federalism. Translating my views into legal doctrine requires revisiting the growing presumption in favor of executive or congressional preemption, and flipping the presumption in favor of local initiatives, each then to be analyzed in its own terms. Moreover, I would put the burden on Congress – as the United States Supreme Court has done in the context of the Eleventh Amendment¹⁹⁵ – to provide a “clear statement” of its preemptive provision and its boundaries. Further, I would not permit preemption based on general claims made by executive branch officials of a need for exclusive authority to act.¹⁹⁶ Here, my advice builds on a famous essay by Herbert Wechsler, who argued that because states were well-represented in Congress, the judiciary ought to be reluctant to oversee congressional statutes affecting state powers.¹⁹⁷ The judiciary should be similarly hesitant to override local or state initiatives absent explicit directions from Congress to do so.

Indeed, in response to rulings like the one on Illinois’s response to genocide in Darfur,¹⁹⁸ localities and states went to Congress to get protection from the courts and the Executive so as to insulate local divestment programs from preemption attacks. In some respects, they succeeded, for in late December of 2007, the Sudan Accountability and Divestment Act (SADA) became law.¹⁹⁹ The statute has a provision licensing localities to divest as long

195. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

196. See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 41-42 (2007). A clear statement rule is also proposed by others. See David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Relocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008), available at <http://www.law.arizona.edu/faculty/FacultyPubs/Documents/Adelman/ALS07-23.pdf>; Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 900-24 (2008). Lisa Heinzerling has also pointed to the technical expertise and political accountability of state executive officials as another argument against preemption. See Lisa Heinzerling, *Climate, Preemption, and the Executive Branches*, 50 ARIZ. L. REV. 925 (2008).

197. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

198. *Nat’l Foreign Trade Council v. Giannoulas*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

199. Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (2007) (to be codified at 50 U.S.C. § 1701).

as they comply with the provisions of the act.²⁰⁰ Prior to divestment, businesses must be given protection, both through a notice and response period to ascertain if the investments in the Sudan fall within specified parameters.²⁰¹ Asset managers get protection through safe harbors from lawsuits under the securities and pension laws.²⁰² The federal government has to divest in its contracting, the SEC and Treasury have some oversight,²⁰³ and the President has the authority both to waive the contracting divestment requirements if “the national interest” so requires and to terminate the law upon a certification that Sudan has stopped the horrors.²⁰⁴

VI. SOVEREIGNTISM, FEDERALISM, AND TRANSLOCAL TRANSNATIONALISM

The Sudan Accountability and Divestment Act brings me full circle, as it is one of a series of democratic iterations demonstrating that the issues I have mapped are by no means settled. In the Act, Congress said it had the authority to respond without violating international obligations or the President’s authority. But when signing the act, President Bush appears to act as if he alone (and not Congress) speaks for the “Federal Government” as he insisted that he retained “exclusive authority to conduct foreign relations.”²⁰⁵

Whether the bill is a comfortable resting place for localities has also been questioned. After its passage, the National Conference of State Legislatures issued a statement asking the Senate Committee on Banking, Housing, and Urban Affairs for federal assistance, as it said that the Act put too much

200. *See id.* § 3(b) (“Notwithstanding any other provision of law, a State or local government may adopt and enforce measures . . . to divest . . . assets” from persons or companies qualifying as having “direct investments in business operations” in the Sudan.)

201. *See id.* § 3(e)(1) (“The State or local government shall provide written notice and an opportunity to comment in writing to each person to whom a measure is to be applied.”).

202. *See id.* § 4 (“Notwithstanding any other provision of Federal or State law, no person may bring any . . . action against any registered investment company, or any employee, officer, director, or investment adviser thereof, based solely upon the investment company divesting from . . . securities issued by persons that the investment company determines . . . conduct or have direct investments in business operations in Sudan.”).

203. *See id.* § 6(a) (“The head of each executive agency shall ensure that each contract entered into by such executive agency for the procurement of goods or services includes a clause that requires the contractor to certify to the contracting officer that the contractor does not conduct business operations in Sudan described in section 3(d).”); *see also id.* §§ 4(b), 10.

204. *See id.* §§ 6(c)(1), 12.

205. *See* Statement on Signing the Sudan Accountability and Divestment Act of 2007 (Dec. 31, 2007), <http://www.whitehouse.gov/news/releases/2007/12/20071231.html>.

of an obligation on states to identify companies making illicit investments.²⁰⁶ Meanwhile, the National Foreign Trade Council, which had successfully challenged both the ban on goods by Massachusetts and the divestiture efforts of Illinois, described the bill as “effectively limiting the scope of state and local government efforts to divest” and while continuing to believe it to be “unconstitutional,” also described it as “one of the more thoughtful approaches” to divestiture.²⁰⁷ (The legal question of SADA's constitutionality turns in part on whether foreign affairs preemption is a constitutional doctrine rather than federal common law; if the doctrine instantiates the President's constitutional power, then it is not subject to congressional regulation.) In short, the categoricalism proffered by the 1998 COMPASS report and by Chief Justice Rehnquist in the *Morrison* decision on the Civil Rights Remedy in VAWA continues to be deployed.

To conclude, consider the lessons to be drawn from thinking about the interactions among internationalism, sovereigntism, federalism, and translocalism. First, as a result of twentieth century developments, we entered the twenty-first century with a different paradigm; the relevant participants in policy debates extend, on the public side, beyond the three branches of the national government and the states, acting either solo or coordinated through Congress. Translocal organizations like the National League of Cities, the U.S. Conference of Mayors, and the collectives of state attorneys general, governors, and state legislators are all exemplary of the multiplication of “national” players, rooted in states yet reaching across them. Currents of laws from abroad have affected U.S. norms before, but the proliferation of translocal and transnational organizations and new technologies make these exchanges more rapid and widespread.

Second, while I can certainly understand the claims made by sovereigntists, about the utility of national identity through law, the need for national economic and energy policies, and the potential costs of fragmentation,²⁰⁸ we cannot avoid multiple and interacting legal regimes. Third, that multiplicity is part of the federalist vision, seeking solace in knowing that competition about ideas and responses exists at the national level that will enliven debates about

206. See Letter from Phillip Frye, Representative of N.C. and Chair, NCSL Labor & Econ. Dev. Comm., to Christopher J. Dodd, Chairman, Comm. on Banking, Hous. & Urban Affairs (Jan. 16, 2008), available at <http://www.ncsl.org/standcomm/sclaborecon/SudanLetter011608.htm>.

207. See Jennifer Cummings, *NFTC, USA*Engage Comment on Sudan Bill*, USA ENGAGE, Jan. 2, 2008, <http://www.usaengage.org/index.php?option=content&task=view&id=226&Itemid=61>.

208. See, e.g., David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 EMORY L.J. 201 (2007); Paul B. Stephan, *What Story Got Wrong—Federalism, Localist Opportunism and International Law*, 73 MO. L. REV. 1041 (2008); see also Thomas W. Hazlett, *Federal Preemption in Cellular Phone Regulation*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS*, at 113, 113-33 (Richard A. Epstein & Michael S. Greve eds., 2007).

what the shape of regulation should be. The underlying issues of how to protect safety and wellbeing and how to recognize liberty, equality, and dignitary interests of individuals are genuinely difficult.

Fourth, to be enthusiastic about multiple layers of policymaking on these issues is not to suggest that positions taken at local collectives or through transnational work are necessarily to be celebrated, any more than one can presume that national regulation is necessarily wise. Further, in terms of democratic theory and concerns about fairness, transparency, and accountability, as I argued, much more needs to be said about what can be gained and lost with the development of subnational quasi-public organizations, captured by the acronym TOGAs, engaged in policymaking.

Fifth, the effort to assert unilateral sovereign control, unaffected by local or transnational rules, cannot succeed. The President may – when signing the Sudan Accountability and Divestment Act – insist on his own authority, and COMPASS may argue that sovereignty prohibits transnational ventures, and federal judges may – and are – finding many local actions preempted. But, as all these rule-makers try to codify a set of problems as “national,” the world in which they are operating belies the truth of that category. The mayors are acting because the problems are local as well as global. Instability surrounds efforts to enshrine distinctions between “commerce” and “manufacturing,” between “direct” and “indirect” effects on commerce, what falls within or beyond the “police powers” of states, and what is “domestic” and what is “foreign.” A sense of the sovereign center, equated with the national government of the United States, exercising exclusive authority to set regulatory parameters, is ephemeral. Pulls from localities, working hard to help people obtain goods and services with a measure of security, and the transformation of political orders outside our borders, make plain that most of our problems – the economy, the environment, physical safety, and national security – do not respect the boundaries of our shores.

When *Missouri v. Holland* is put with the case it cited at its end – *Carey v. South Dakota* – what emerges is a presumption of concurrency, of a recognition of national power not divested by states, but also of state power not divested by the national government. Our central case is after all, oddly enough, named *Missouri v. Holland*. The Holland there was, as I mentioned, Ray P. Holland, the U.S. game warden. My argument, of course, is that we should conceive of the world as Missouri *and* Holland, here referring not to a person but rather to a nation now called the Netherlands, and to the dozens of other countries with which Missouri has allied in subnational relationships through Sister Cities and many other methods. The U.S. federal system is rich with mechanisms for both importation and exportation, and our joint challenge is to understand – as sovereigntists remind us – which norms we want to claim and proudly embrace as definitionally part of “our” law.